Green Apple Supermarket of Jamaica, Inc. *and* United Food and Commercial Workers, Local Union 342, AFL–CIO. Case 29–CA–183238 and 29–CA–188130

July 11, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On October 19, 2017, Administrative Law Judge Kenneth W. Chu issued the attached decision, and on November 1, 2017, he issued an Errata. The Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] as modified here, and to adopt the recommended Order as modified and set forth in full below.[3]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 7:

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's findings, we do not rely on his citations to *Wal-Mart Stores, Inc.*, 352 NLRB 815 (2008), and *Brighton Retail, Inc.*, 354 NLRB 441 (2009), which were decided by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). The judge also cited several decisions that, while issued by two-member panels, were subsequently affirmed. See *Gelita USA, Inc.*, 352 NLRB 406 (2008), affd. 356 NLRB 467 (2011); *Monmouth Care Center*, 354 NLRB 11 (2009), affd. 356 NLRB 152 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012); and *SFO Good-Nite Inn, LLC*, 352 NLRB 268 (2008), affd. 357 NLRB 79 (2011), enfd. 700 F.3d 1 (D.C. Cir. 2012). *Fused Solutions*, 359 NLRB No. 118 (2013), affd. 362 NLRB No. 95 (2015), is a summary judgment case and we do not rely on it here.

[2] No exceptions were filed to the judge's dismissal of the complaint allegations that the Respondent maintained unlawful confidentiality and texting work rules, or that the unlawful discharges of Anthony Smith and Joel Tineo violated Sec. 8(a)(5). Further, the Respondent failed to timely file a brief in support of its exceptions. Therefore, our review is limited to the exceptions document and any citation of authorities and supporting argument contained therein. See Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations. These exceptions fail to demonstrate any basis for overturning the judge's findings. However, we reverse the judge's mistaken finding that the Respondent's threats to employees on June 8, June 24, and August 10, 2016 violated Sec. 8(a)(3) in addition to Sec. 8(a)(1). A threat to protected Sec. 7 activities violates Sec. 8(a)(1), as the judge correctly found. It is not an adverse employment action that violates Sec. 8(a)(3). We also reverse and dismiss the judge's sua sponte finding that the Respondent violated Sec. 8(a)(3) by more strictly enforcing work rules against unit employees. Additionally, although we affirm the judge's finding that the Respondent violated Sec. 8(a)(5) by failing to furnish to the Union requested relevant information, we reverse his spontaneous finding that the Respondent also violated Sec. 8(a)(5) by unreasonably delaying in furnishing the Union with requested relevant information. Neither the stricter enforcement of the work rules nor the delay in providing information was alleged or litigated as a separate violation. Finally, we do not pass on the judge's finding that the Respondent engaged in "objectionable conduct when it held a captive-audience mesosseting" on June 24, 2016, as no representation issues were presented in this unfair labor practice proceeding.

Member McFerran joins her colleagues in adopting the judge's finding that the discharges of Anthony Smith and Joel Tineo violated Sec. 8(a)(3) of the Act. Although the judge's analysis was limited, Member McFerran finds the evidence supports his conclusion that the Respondent had knowledge of both Tineo's and Smith's protected activity. With respect to Tineo, she notes that there are only five employees in the unit, and supervisor Perez was aware that the meat-department employees had signed authorization cards and spoke to several meat-department employees about unions, including Tineo. Perez also spoke to employees planning to vote during the 10 minutes immediately before the election and was therefore aware of the prospective voters, all of whom voted for the Union. Moreover, supervisors Wang and Yeung, present at the election on behalf of the Respondent, were in a position to see the four employees who voted during the election. Given the unanimous vote for the Union, the Respondent's knowledge of Tineo's protected activity seems clear. With respect to Smith, Member McFerran finds evidence of the Respondent's knowledge of his protected activity in the small size of the unit and the unanimous election result, as well as Smith's active participation in organizing efforts and discussions with other meat department employees concerning the Union. Moreover, the credited testimony shows Smith spoke with supervisor Perez about the Union and the authorization cards, and was told that the Respondent was not only "against the Union" but that the Respondent would close if the employees chose the Union. Smith also served as the Union's steward.

In adopting the judge's finding that the Respondent unlawfully refused to furnish requested information, Member Emanuel notes that the Respondent's duty to provide nonunit information was triggered only at the time the Union demonstrated the relevance of such information—here, at the hearing. In adopting the judge's finding that the Respondent unlawfully discharged employee Tineo, Member Emanuel notes that although there was testimony that Tineo had refused an order to mop the floor in a different department shortly before his discharge, the Respondent does not contend that Tineo was discharged for insubordination, but instead argued that he was discharged for tardiness, which the judge found pretextual.

[3] We have amended the judge's conclusions of law and recommended Order consistent with our findings herein and to conform to the Board's standard remedial language, and substitute a new notice to conform to the Order as modified.

We agree with the judge's denial of the General Counsel's request that the make-whole remedy include consequential damages. See, e.g., *Advanced Masonry Associates, LLC*, 366 NLRB No. 57, slip op. at 1 fn. 4 (2018).

Unlike his colleagues, Member Emanuel would not include a notice-reading requirement in this case. Recognizing that a notice-reading is an extraordinary remedy only for instances in which a respondent's unlawful conduct is widespread and sufficiently serious or egregious, Member Emanuel believes that a notice reading is neither necessary nor appropriate to remedy the violations here.

"7. The Respondent threatened unit employees with termination, plant closure, and stricter enforcement of work rules for their support of the Union in violation of Section 8(a)(1) of the Act."

2. Substitute the following for Conclusion of Law 9:

"9. The Respondent refused to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees."

ORDER

The National Labor Relations Board orders that the Respondent, Green Apple Supermarket of Jamaica, Inc., Jamaica, Queens, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with stricter enforcement of work rules because they supported the Union.

(b) Threatening employees with discharge and plant closure if they select the Union as their bargaining representative.

(c) Disciplining employees because of their support for and activities on behalf of the Union.

(d) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

(e) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(f) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Anthony Smith and Joel Tineo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Anthony Smith and Joel Tineo whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Anthony Smith and Joel Tineo for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written warnings and discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the written warnings and discharges will not be used against them in any way.

(e) Upon request of the Union, rescind the new work schedule policy for unit employees that was unilaterally implemented on or about July 4, 2016.

(f) Furnish to the Union in a timely manner the information requested by the Union on September 8, 2016.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Jamaica, Queens, New York facility copies of the attached notice marked "Appendix"[4] in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 8, 2016.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(i) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which shall be scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read to employees, in English and Spanish, by a responsible management official in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a responsible management official and, if the Union so desires, an agent of the Union.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 11, 2018

Lauren McFerran,	Member
Marvin E. Kaplan,	Member
William J. Emanuel,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with stricter enforcement of work rules because you support the Union.

WE WILL NOT threaten you with discharge or plant closure for selecting the Union as your bargaining representative.

WE WILL NOT discipline you because of your support for and activities on behalf of the Union.

WE WILL NOT discharge or otherwise discriminate against you for supporting the Union or any other labor organization.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its function as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Anthony Smith and Joel Tineo reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Smith and Joel Tineo whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Anthony Smith and Joel Tineo for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within14 days from the date of the Board's Order, remove from our files any reference to the unlawful written warnings issued to and discharges of Anthony Smith and Joel Tineo, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the written warnings and discharges will not be used against them in any way.

WE WILL, upon request of the Union, rescind the new work schedule policy for our unit employees that we unilaterally implemented on or about July 4, 2016.

WE WILL furnish to the Union in a timely manner the information requested by the Union on September 8, 2016.

GREEN APPLE SUPERMARKET OF JAMAICA, INC.

The Board's decision can be found at www.nlrb.gov/case/29-CA-183238 or by using the QR code

below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Genaira L. Tyce, Esq., and *David Stolzberg, Esq.,* of Brooklyn, New York, for the General Counsel.
David Yan, Esq., of Queens, New Yor*k*, for the Respondent.
Eric Milner, Esq., of Valley Stream, New York*,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Brooklyn, New York, on March 21, 23, April 27, 28, May 2, and June 20, 21, 2017, pursuant, to a complaint issued by Region 29 of the National Labor Relations Board (NLRB) on January 31, 2017.

Green Apple Supermarket of Jamaica, Inc. (Respondent) is a full service supermarket located in Jamaica, New York. On June 24, 2016, Region 29 conducted a representation election of Respondent's unit employees and on July 11, the Board certified United Food and Commercial Workers, Local Union 342, AFL–CIO (Union) as the collective-bargaining representative of the following unit employees:

> All regular full-time and part-time employees employed in the meat and deli departments, excluding all store supervisors, grocery workers, managers, guards, and supervisors as defined by the Act.

The complaint (GC Exh. 1V)[1] alleges in paragraph 12 that on about May 15, 2016,[2] the Respondent maintained in effect the following work-related rules:

> a. All documents are considered confidential and the sole property of Green Apple Supermarket and are not to be distributed or taken off the premises. There is to be no copying, faxing or photographing of documents. Failure to comply may result in dismissal and legal action.
>
> b. Texting and playing electronic games is strictly prohibited and will result in a warning: 3 warnings will result in a dismissal.

Complaint paragraphs 13 and 14 allege that Erik Peralta Perez, the Respondent's manager of the meat department, threatened to terminate the employees on about June 8 if they voted for the Union and threatened employees with more strict enforcement of the work rules on August 10 because the employees joined and supported the Union.

Paragraphs 15, 16, and 17 allege that Joel Tineo and Anthony Smith were disciplined and discharged by the Respondent because they supported and assisted the Union and engaged in concerted activity and to discourage employees from engaging in these activities.

The complaint also alleges in paragraphs 18 and 20 that the Respondent implemented a new work schedule about July 4 applicable only to the unit employees without prior notice to the Union and without affording the Union an opportunity to bargain over the changes.

Paragraphs 22 and 24 in the complaint allege that the Union made a request for information on September 8 and the Respondent failed and has failed and refused to furnish the following information:

> a. A copy of the employer's healthcare plans and rates per coverage dependents;
> b. A copy of the employer's handbook;
> c. Any written policies and procedures;
> d. Current paid vacation, personal and sick days employees receive;
> e. Copies of employment applications currently being used; and
> f. Names and rates of pay employer is paying to employees in each store, by hour.

The Respondent timely filed an answer denying the material allegations in the complaint (GC Exh. 1CC).[3]

On May 22, 2017, the counsel for the General Counsel moved to amend the complaint (GC Exh. 20 at 11–14) to include the following allegation:

> Paragraph 6 shall include "Jesse" (surname unknown) - store owner.
> New Paragraph 8: About June 24, 2016, Respondent, by Jesse, at the Respondent's facility, during a captive audience meeting, made a threat of plant closure to employees.[4]

On the same date, the counsel for the General Counsel moved for *Bannon Mills* sanctions for failure and refusal of the

[1] The exhibits for the General Counsel are identified as "GC Exh." and the Respondent's exhibits are identified as "R. Exh." The posthearing briefs are identified as "GC Br." for the General Counsel and "R. Br." for the Respondent. The hearing transcript is referenced as "Tr."

[2] All dates are in 2016 unless otherwise indicated.

[3] The Respondent raised several non-meritorious defenses in its answer. Respondent asserted that the alleged unlawful conduct occurred more than 6 months prior to the filing of the instant complaint and is barred by 10(b) of the Act. The record shows that the charge was filed by the Union within 6 months. The charge was received by the Region on October 28, 2016, regarding allegations occurring from June 8, 2016 through August 15, 2016. The Respondent also maintained that the Regional Director lacked the authority to issue the complaint. The Regional Director was appointed to her position by a fully constituted Board on September 8, 2016, and had full authority to issue the complaint on January 31, 2017.

[4] All subsequent paragraph numbers were increased by one due to the amendment.

Respondent to comply with General Counsel's subpoena request. The Respondent filed its opposition to the motion (GC Exhs. 20, 21). The motion to amend and for *Bannon Mills* sanctions was granted on June 6, 2017. My order granting the General Counsel's motion to amend and for sanctions is included as "Appendix 1" to this decision.

On the entire record, including my assessment of the witnesses' credibility[5] and my observations of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the posthearing briefs filed by the General Counsel and the Respondent6, I make the following

[5] Witnesses testifying at the hearing included Brian Cugini, Leidy Zabala, Louis Sollicito, Miguel Gonzalez, Anthony Smith, Joel Tineo, Nicholas Alamrante Almengo, Erick Peralta Perez, Jason Mei Phu Wang, and Jia Ming Guo.

[6] The posthearing briefs were due at the end of the day on August 25, 2017. The Respondent electronically filed its brief at 12:01:11 a.m. on August 26, essentially, a minute and 11 seconds late in its submission. The attorney for the Respondent moved for acceptance of his brief and maintained that he had efiled his brief prior to midnight, but the date stamp on the document received was delayed because of ". . . travel through the cyber space to be accepted by the Board due to the complexity of the Board's efiling system" (See Respondent's motion for acceptance of late filed posthearing brief to the Administrative Law Judge, dated August 26, 2017). The counsel for the General Counsel opposed, contending that NLRB's efiling system specifically explains to the parties that the ". . . parties are strongly encouraged to file documents in advance of the filing deadline and during the normal business hours of the receiving office, in the event problems are encountered and alternate means of filing become necessary" and argued that the failure to timely submit documents will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some reason (see General Counsel's opposition to Respondent's motion to accept untimely filed posthearing brief, dated August 28, 2017). I have decided to accept the Respondent's posthearing brief after due consideration of counsel's reply to the opposition of the General Counsel to the untimely filing of the Respondent's brief. The filing deadline was 11:59 p.m. on August 25. The Respondent's brief was electronically date stamped at 12:01:11 a.m. on August 26. It is clear that a user who waits until after close of business on the due date to attempt to E-File does so at his/her own peril. However, Sec. 102.111(c) of the Board's Rules and Regulations states that a party may file a brief within a reasonable time after the applicable deadline based on a showing of "good cause . . . based on excusable neglect and when no undue prejudice would result." This is not the situation where a brief was hours or days late upon submission. In other contexts, the Board has exhibited some leniency regarding filing deadlines particularly when the delay has not resulted in prejudice to other parties. See, e.g., *Bon Appetit Management Co*., 334 NLRB 1042 (2001) (Excelsior list 1 day late); *Pole-Lite Industries*, 229 NLRB 196 (1977) (Excelsior list 3 calendar days and 1 working day late). I find good cause in the Respondent's explanation and that there was no prejudice to the General Counsel in accepting the posthearing brief from the Respondent. Here, the Respondent's untimely submission was due to a delay in the electronic transmission of his document. The counsel for the General Counsel does not contend that the delay of a minute and 11 seconds resulted in an undue prejudice. I would accept the explanation of counsel for the Respondent that the process in electronically filing his brief commenced prior to the deadline but was not electronically concluded until a minute after the deadline.

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent, a domestic corporation, with an office and place of business located at 92-45 Guy R. Brewer Boulevard, Jamaica, New York (facility) is engaged in the operation of a retail grocery store where it derived gross annual revenue in excess of $500,000 and purchased and received goods and materials valued in excess of $5000 at its Jamaica facility from suppliers outside the State of New York during the last 12 months. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The United Food and Commercial Workers, Local Union 342, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

a. The Union's Organizing Campaign at the Respondent's Jamaica Facility

Brian Cugini (Cugini) has been the business agent for the Union since September 2016, and a union organizer for 5 years prior to assuming his current position. While employed as an organizer for the Union, Cugini was informed by Kelly Egan (Egan), the union director, in May that two employees had asked for a union at the Jamaica facility. Cugini testified that he met Anthony Smith (Smith) in early May near the corner of Respondent's supermarket. According to Cugini, Smith told him he was employed as a butcher in the meat department at the supermarket and was also a former union member. Smith complained to Cugini about his low wages and lack of benefits while employed with the Respondent. Cugini met with Smith several times a week during the month of May (Tr. 19–23, 27, 28).

Cugini was introduced to other workers from the meat department by Smith. Cugini said he met the other workers about once a week, sometimes on a one-to-one basis. Cugini said he provided Smith with information about the Union, such as union campaign, rules and regulations, the NLRB and organizing, and Smith would convey the information to the other workers. Cugini also provided Smith with union authorization cards. In turn, Cugini received signed authorization cards from the meat department workers through Smith (Tr. 125–129). Cugini recalled there were six employees, including Perez, in the meat department unit in May (Tr. 58).

Leidy Zabala (Zabala) testified that he has been an organizer with the Union for 6 years. Zabala was assigned by Egan in May 2016, to work with Cugini on the Green Apple organizing campaign. Zabala was introduced to Smith and other meat department workers in May and met with them twice or three times per week prior to the June 24 union election. Zabala spoke Spanish to non-English speaking workers from the meat department and also received union authorization cards from the workers through Smith (Tr. 125–129). Zabala recalled meeting and speaking to Joel Tineo in May 2016 outside the Jamaica store. Tineo was a worker assigned to the meat department during the relevant time of this complaint (below). Zabala testified that she spoke to Tineo about his job, benefits, wages, and organizing with the Union (Tr. 156–160).

The Union filed a representation petition that was served on the Respondent on May 20 (GC Exh. 2). According to Cugini, he received a phone call from Smith that same day and was informed that management told the meat department workers that the Respondent would close the store if the crew voted for the Union. Cugini testified that the comment was made by Erick Peralta Perez (Perez) to the unit employees. Perez has been identified in the record as the meat department manager.

Cugini said he spoke with Smith the following morning near the location of the supermarket and Smith elaborated that Perez told the workers that management had three options, 1) close the entire facility, 2) close the meat department or 3) to discharge everyone (Tr. 23–32).

The representation petition was withdrawn and second petition was filed on May 31. A stipulated election agreement was signed and a NLRB hearing was held on June 8. Present at the hearing was Cugini, a labor counselor for the Union, the attorney for Respondent, David Yan, Zabala and Smith. Cugini believed that the owners were present but were not identified by names. Cugini said that no one testified at the June 8 hearing. Zabala recalled that a Wendy Yeung and another Respondent member were present but could not identify the second person. Zabala confirmed that no one testified at the June 8 hearing and did not recall any threats being made to Smith by the Respondent on that date (Tr. 129–132, 154). However, Cugini testified that Smith called him shortly after the June 8 hearing and informed him that Perez told Smith that the owners were willing to close the supermarket if the workers voted for the Union (Tr. 32–38; 129–132; GC Exhs. 3, 4).

A union election was held on June 24. Jason Mei Phu Wang (Wang) was present for the Respondent. Cugini said that Wang was identified as the assistant store manager for the Jamaica facility. Cugini also said that Wendy Ping Yeung was also present from the Respondent.[7] Cugini did not know the title held by Yeung with the Respondent. Cugini said that Smith was present as an observer. Prior to the balloting, the Respondent, through Yeung, objected to the presence of Smith. The Board agent informed Yeung that Smith's presence was permitted under Board rules (Tr. 80–85).

Cugini testified that five workers voted during the election (Tr. 58–65). Based upon the results of the election, the Union became the exclusive collective-bargaining representative of the meat department unit employees. There were five eligible voters and 4 votes were casted for the Union. The Union was certified as the representative for the unit employees on July 11 (Tr. 38–44; GC Exhs. 5 and 6).

Zabala testified that after the Union won the election, she continued to speak with the workers outside the store and began going into the store approximately twice per week to meet with the workers. During that time, she spoke to the unit workers about proposals for contract negotiations. Zabala said that she met with the store manager and had his permission to speak with the workers in the store. Zabala identified the store manager as David (last name unknown). Zabala also met with Wang during this time (Tr. 132–137, 215).

[7] Wendy Ping Yeung identified herself at the hearing as a representative of the Respondent and held the position of an "assistant" (Tr. 6, 7).

b. The Respondent Discharges Anthony Smith and Joel Tineo

1. The discharge of Anthony Smith

Anthony Smith (Smith) was employed at the Green Apple Jamaica facility in September 2015. Smith said he was hired by Perez, who he believed was the meat department manager at the time. Smith has observed Perez assign tasks to the workers in the meat department and assigned their work schedules. Smith said he was hired as an assistant manager to Perez and butcher. Perez interviewed Smith and gave him a meat cutting test before hiring Smith. Smith was given an unwritten work schedule by Perez from Monday to Friday, 8 a.m. to 5:30 p.m. at $10 per hour with $15 for overtime. Smith was responsible for cutting meat, checking orders and verifying deliveries to the meat department. Smith said he never received any complaints from Perez on his work performance (Tr. 332–334). Smith said he is aware that David (did not know his surname) was the store manager and Jason Wang was his assistant.

Smith testified that he was laid-off in January 2016, and was recalled to work 1 or 2 months later. During the time he was laid-off, Smith contacted the Union to see if there was another job available for him because he was a member of the Union in a previous job. There was nothing available for him, but upon returning to work, Smith contacted the Union and began speaking with Cugini, Egan and Zabala about getting benefits and better wages at the Green Apple facility (Tr. 337–338).

Smith became involved in getting the Union into the Green Apple facility. He explained to Cugini that the wages were low; there were no medical benefits; no sick leave available; and no avenue for "venting" complaints to the Union. Smith said he was asked by Cugini to see if other workers were interested in having a Union. Smith became the conduit between the Union and the meat department workers. Smith testified that the workers agreed that a union would be beneficial. Smith received authorization cards from Cugini and obtained signatures from the unit employees. Smith was aware there was a hearing on June 8 regarding the union petition and attended the hearing along with Cugini, Egan, Zabala, and the Union's labor attorney. Smith observed a male and female representative from the Respondent and their attorney (Tr. 338–342).

Smith said he spoke to Perez the next day and was informed by Perez that the Respondent complained they were losing money and the Union would hurt its business. According to Smith, Perez said that the owners were against the Union and told him that "if the Union does come in they will shut down the meat department and if they had to they would closed the entire building." Smith conveyed to Cugini what Perez had told him (Tr. 342, 343).

Smith continued to work with the Union after the petition hearing and was involved as a designated observer during the election on June 24. Smith recalled that a female and Jia Ming Guo, the payroll accountant, were present for the Respondent at the election. Smith could not identify the female, but was told by her that he should not be present. A Board agent at the election corrected her and said that Smith could remain as an observer. After the Union won the election, Smith became the union shop steward. Smith recalled that six workers, including

Perez, worked in the meat department after the election (Tr. 343–346).

Smith testified that the working conditions changed after the election. Smith said there was closer scrutiny and visits by the store manager and assistant manager. Smith said that David, the store manager, and Wang did not come around as often prior to the union election, but came more frequently to the meat department after the election. He described the visits as "intense" and occurring 3 or 4 times a day. He said that David and Wang would ask questions; ask for the meat manager; point to missing product items; instructed the workers to get products out quicker; and they would stand and watch the workers. Smith complained about August 10 to Perez that it seemed the workers had "targets on their backs" after joining the Union. Smith said that Perez disagreed with Smith's assessment, but did tell the workers to be on their best behavior and make sure they get work done on time and to call if they were running late. Perez explained to Smith that he did not want the workers fired for an infraction because the Union was in the shop (Tr. 346–350, 407).

Smith testified that he had one written infraction which was for being late to work when he arrived at 8:40 instead of 8 a.m. Smith complained about this written warning because he believed the lateness should have been a verbal warning since he never had a previous write-up for being late and the store oftentimes did not open until 15–20 minutes later (Tr. 350–354; GC Exh. 9). Smith testified that he was running late because he missed his bus and arrived at 8:40 instead of 8 on August 8. He did not contact anyone that he was going to be late for work, but he also insisted that no one spoke to him about his lateness when he arrived at the store. Smith again stated that he has never received a warning for his past lateness except for this one time (Tr. 357–360).

Smith's second and third written warnings were for not punching out and in during his lunchbreak. Smith said he worked through lunch and did not punch out or in during his lunch period on two consecutive days on August 10 and 11. Smith explained that he decided to work through lunch because the meat department was short on help with two workers being absent. Smith informed Perez that he was going to work through lunch and said he received permission from Perez to work through his lunch period. According to Smith, Perez told him to "do what he has to do" and no one objected. Smith understood that under the Respondent's store policy that arriving late or not punching out and in for a lunch period would result in a written warning.

It is not disputed that Smith received and acknowledged a copy of the store policy, which included the rule requiring all employees to punch out and in for their break times (Tr. 381, 382; GC Exh. 8a). However, Smith maintained that Perez said to him to "do what you've got to do because we've got to get these cases in (the products)" (Tr. 354–356, 360–364; GC Exhs. 10 and 11).

Smith said he was discharged on August 15 after his third and final warning. Smith repined that he never received a written warning before his termination, but received all three warnings on the same day as his discharge. Jason Wang was identified as the person who issued him the three write-ups.

On the day of his discharge, Smith testified that he was running late to work due to a court appointment. He contacted Perez that morning and requested time off until 12 noon. Smith said that Perez had no problem with him arriving at 12 noon, but he then received a phone call from Perez just before noon and was told he was needed as soon as possible because another worker, Joel Tineo, was just fired and he needed Smith's help in the meat department. Smith was unable to arrive at work until after 1 or 1:30 p.m. When Smith started working, he was informed by Perez that there were some disciplinary write-ups for him to sign and that he should go see Wang. Smith went to see Wang, but he was not available and went back to work. Smith was call a second time by Perez to see Wang and Smith went back to see him. Smith said that he disputed the one write-up about being late by 20 minutes on August 8. According to Smith, Wang told him "…don't worry about it, just sign it; don't sweat it." Smith was willing to accept the two warnings for not punching out and in during the break, but disagreed on his lateness warning. Smith said he had second thoughts and decided to scratch off his name on the lateness write-up after he had signed the warning at Wang's insistence.

Smith disputed the August 8 infraction for arriving 20 minutes late because he should have received a verbal warning before receiving a written warning. Smith said he has been late before and never given a warning. He believed management should have first given him a verbal warning on the day he was late (Tr. 395–398; GC Exh. 9). Smith also noted that he never received a write up for being late on the day of his discharge but was still docked his wages for being late (Tr. 402–403, 422, 425).

Smith did not dispute the two write-ups for not clocking out and in because he went beyond the 6 hours of work and did not take lunch. However, Smith told Wang that he was excused from taking a lunchbreak by Perez. Smith denied that he was not working and had taken a smoke break without clocking out. Smith insisted he received permission from Perez to work through his break (Tr. 387–392; GC Exh. 10). As noted, Smith said he was told by Perez "…to do what he had to do." (GC Exh. 11; Tr. 392–395). Smith said that Perez was present on the day of his discharge, but said nothing to defend Smith.

According to Smith, the Store Manager, David, appeared after he received the three written warnings and started shouting at Smith. Smith testified that when he went to speak to Wang about the write-ups and asserted to him that his August 8 lateness should have been a verbal not a written warning, David interjected into their conversation by screaming at Smith and telling him "He should know, he knew about the union, fuck it, he's terminated, call your union." Smith said he walked away and got his belongings and left the store (Tr. 334–336, 367–375; GC Exh. 12: Smith's termination notice).

2. The discharge of Joel Tineo

Joel Tineo (Tineo) is a non-English speaking employee who was hired by the Respondent and worked as a meat wrapper in the meat department from April 2015 until his discharge in August 2016. Tineo identified the person who had hired him as "Pedro" and said that Pedro subsequently resigned. Tineo was then supervised by Perez, who gave him his work assignments

and schedule. Tineo said he worked 50–54 hours per week with overtime. Tineo said that Perez would also review his work assignments and performance and insisted he worked well with Perez. Tineo indicated that he had little interaction with other managers or supervisors when he started working at the Jamaica facility. Tineo specifically testified that he never communicated with the owners when he was hired in December 2015, and never spoke to the owners after December 2015, until the union came to organize the department (Tr. 497).

Tineo recalled that the Union was attempting to organize the meat department in May 2016, and had agreed with the other workers that a union would be beneficial. Tineo said that he had spoken with the workers in the butcher shop. Tineo did not remember prior to the union election if anyone from Respondent had spoken to them. When specifically questioned whether anyone from the Respondent spoke to him, Tineo stated "no one" (Tr. 451–456).

However, Tineo testified that there was a meeting held by Respondent officials on the day of the election but prior to the actual voting. Tineo testified that the workers were told by a female named Jesse (surname unknown) as translated by Perez, that the Respondent would close the store if they voted for the Union. Tineo believed Jesse was one of the owners of the store. Tineo recalled that Perez and Smith were present and that they heard the remark being made by Jesse. Tineo also stated that another owner, who he believed was the husband of Jesse, was also present. Tineo did not know his name. He said that Perez told the workers that they were the owners (Tr. 467–469, 490, 491).

Tineo said he voted in the union election in June 24, 2016, and continued to work after the election. Like Smith, Tineo insisted that the working conditions changed drastically after the election. He said that hardly anyone from management spoke to the workers, but when they did speak, they spoke to him and others in a "bad" way by screaming. Tineo identified the management officials as David, the store manager, and James, another assistant store manager. Tineo said that he was threatened with termination by James and David if he didn't do what he was told (Tr. 456–458).

Tineo was terminated on Monday, August 15. Tineo testified that he was asked by David through either James or Wang to work a different department on the preceding Friday. Tineo said that the instructions were given to him by a Spanish speaking employee working the cash register. Tineo refused to work in a different department and told Wang the same. Tineo repined that Wang wanted him to mop the floors in the produce area, but refused and continued to work at the meat department. Tineo said that he was told by either James or Wang that David would fire him on Monday if he continued to refuse the order. Tineo worked the weekend and came to work on Monday (Tr. 457–462). Tineo testified that he has been given instructions to work at other departments but after the arrival of Perez, he has work exclusively with the meat department (Tr. 488–490).

On Monday, Tineo arrived at work and Perez told him to go to the facility's office. The Union Representative, Zabala, was also at the store on Monday on another matter. Tineo said that Perez, Jia Ming (Guo) and Jesse were present when he arrived at the office. Tineo identified Guo as the payroll accountant and also as someone in charge of the store. Tineo said that Guo gave him the notice of termination. Tineo was not given a reason for his discharge and asked Perez, who did not know. Tineo then asked Perez to ask Guo for a reason. Tineo said that Guo remained silent (Tr. 491–493). After his meeting, Tineo said that he spoke to Zabala immediately about his discharge. He insisted that he spoke to Zabala "The moment of his discharge" and asked her to inquire as to the reason for his discharge. Tineo's notice of discharge, dated July 20, did not state a reason for his discharge (Tr. 462–467, 493; GC Exh. 14-notice of termination).

Tineo admitted that he has been late to work on a frequent basis, about twice a week. Tineo said he was aware of his work schedule, but insisted that Perez provided him with a verbal flexible schedule and was told on a daily basis by Perez as to when to arrive at work on the following day. Tineo insisted that he never signed a written work schedule and denied that it was his signature on the work schedule that was allegedly signed by him on July 8 (GC Exh. 8B). Tineo denied receiving any disciplines for tardiness prior to his termination. On the date of his discharge on August 15, Tineo received three written warnings, dated July 4, 18 and 20. Tineo also denied receiving and acknowledging the store policy statement (Tr. 469–473; GC Exhs. 13, 15, 16 and 17).

On cross-examination, Tineo reiterated that he never received the July 8 written work schedule and insisted he had a flexible schedule. Tineo said that James, the assistant manager gave him a work schedule from 10 a.m. to 7 p.m. when he was hired in 2015, but subsequently Perez would give him a daily work schedule for each day. Tineo insisted that he was given a new schedule every day. Tineo said that when he was late, he would contact Perez and stay to make up the time. Tineo testified (Tr. 475–485) that

> For example, I would call Erick. I would say, I can come in at 12:00, he would say yes so I could stay till closing. Not all the time I would arrive late. It could be once a week or two. Sometimes three. But not all the time.

Tineo said that when he told Perez he was running late, Perez never gave his approval or disapproval and never said anything about his lateness when he arrived at work (Tr. 486, 487, 500).

3. The testimony of Nicholas Alamrante Almengo

Nicholas Alamrante Almengo (Almengo) was employed at the Jamaica facility in November 2015. Almengo testified that he was hired by Perez and understood him as the manager of the meat department because Perez would assigned him work to cut poultry, wrap the chicken in plastic trays, and his work schedule from 8 a.m. to 6 p.m. when he was hired. Almengo had also observed Perez verify the meat inventory, review the billings for the merchandise, place meat orders and sign the orders. Almengo said he resigned from the Jamaica facility on November 3, 2016, because of the low wages and excessive work (Tr. 520–525, 538–540).

Almengo testified that his work schedule was given to him in writing for the first time soon after the Union was certified as the exclusive bargaining representative for the meat department

unit employee (Tr. 525–527). Almengo said he signed the work schedule document, but said his work hours were different from his written schedule. Almengo said he was also not familiar with the store's lateness policy (GC 8(d); Tr. 532–538). Almengo testified that he was aware of the store's policy about punching in and out upon arriving at work and during his lunchbreak. Almengo testified that he has consistently punched in and out four times per day and was told by Ming Guo to do so on his first day at work (GC Exh. 8(d); Tr. 546–548).

Almengo said he knows David as the store manager, but does not know his last name. He also knows Wang as the second person in charge after David. He has observed Wang receiving and verifying the merchandise. Almengo knows Ming Guo as the payroll accountant at the store (Tr. 527, 528).

Almengo had discussed wages and other benefits, such as vacation, insurance, raises and getting better equipment with Cugini and the president of the Union. Almengo believed he had three conversations with Cugini, but did not recall when he had the conversations (Tr. 538–540). Almengo admitted that he was never told by management not to speak to the Union before the election (Tr. 543–545).

Almengo also recalled discussing the Union with the meat department workers in May 2016. Almengo testified that they discussed having a Union "to find something better for us like wages, salary, and insurance." He did not recall if anything else were discussed about the Union. Almengo said he worked on the day of the election on June 24. Almengo recalled that Perez, Santa,[8] and Smith were also there prior to the actual voting. Almengo testified that Perez told them that the owners would close the company if they voted for the Union. Almengo said the message was conveyed to them in Spanish by Perez and was told that the message was from the owners regarding the closing of the store. Almengo said that Perez told them that the owner was a lady, but Almengo did not know her name (Tr. 527, 528). Almengo said that the meeting took 10 minutes and the voting occurred 10 minutes after this meeting (Tr. 528–532). On cross-examination, Almengo testified never seeing the lady owner and had only verbally received her message from Perez who told them in Spanish that the message was from the lady, who was the owner (Tr. 548).

Almengo repined that the work was different after the Union was voted in. Almengo complained about constant surveillance by David and was told to perform work that was not part of his duties in the meat department. Almengo testified that David came by every day, but did not observe anyone else from management accompanying David. Almengo did not recall David saying anything to him. Almengo said that David only used hand gestures and would point with his finger when he wanted him to go and mop the floor. Almengo said that David would also have Santa (Nunez) translate into Spanish what he wanted done. Almengo said that after a period of time, Santa refused because she was just an employee and did want to give instructions to others (Tr. 548, 549, 550–552).

Almengo was also aware that Tineo and Smith would arrive late to work, but believed that Smith was disciplined only after the Union came in. Almengo recalled that the discipline was given by Perez to Smith in front of the other workers. Almengo also testified that Tineo was always late to work, but believed that Perez did not care about Tineo's lateness because Tineo would only get paid for the hours he had worked. Almengo also believed that Tineo received his first discipline after the Union came in. Almengo testified that he complained to Perez when Tineo and Smith came in late and maintained he was not aware of any discipline given to the unit workers prior to the arrival of the Union (GC 8(d); Tr. 532–538; 543, 543).

c. The Respondent's Rebuttal to the Discharges

1. The testimony of Erick Peralta Perez

Erick Peralta Perez (Perez) testified on behalf of the Respondent.[9] Perez started working in the meat department at Green Apple in mid-2015. He denied being a supervisor, but testified that he performed all aspects of work in the meat department, including cutting, wrapping, pricing the products and cleaning the floor. He also verified the orders that were received in the meat department, and assigned the work schedules to the butchers and wrappers. He said that their written work schedules were based upon the workers' preference and he tried to accommodate their preferences. Perez denied interviewing Tineo and Smith but did give them work assignments and schedules. Perez said he gave Tineo the assignments to cut, grind, and wrap the meat. He denied instructing Tineo to mop or clean the floors (Tr. 566–570; 603).

Perez testified that Tineo's schedule did not change (GC Exh. 8(b)). Perez signed as the department manager on Tineo's work schedule. Perez said that Tineo always failed to adhere to his work schedule. Perez denied verbally changing Tineo's schedule on a daily basis (Tr. 570–575). Perez testified that Tineo's schedule was initially given to him in writing (Tr. 571). However, on cross examination, Perez admitted that he had verbally changed Tineo's schedule once or twice per week (Tr. 637).[10]

With regard to Tineo, Perez insisted that he verbally warned Tineo of his lateness on many occasions. Perez could not recall

[8] Santa has been identified as Santa Victoria Nunez (GC Br. at 6), a meat wrapper with the unit.

[9] Perez was referenced throughout the hearing as Peralta, but his actual surname is Perez (Tr. 622).

[10] The counsel for the Respondent proffered the store policy that Tineo purportedly received and acknowledged when he was hired (R. Exh. 3). The counsel for the General Counsel objected because it was not signed by Tineo. The General Counsel maintained that the document fell within my sanction order because Tineo's store policy and his acknowledgement of the policy had not been produced pursuant to subpoena. The counsel for the Respondent insisted that the documents were submitted either on March 20 or 22. The copies of the store policy signed and acknowledged by the workers were not submitted until April 27. However, the April 27 submission did not include the store policy received and acknowledged by Tineo when he was hired. As such, Respondent's exhibit 3 was rejected (Tr. 593–597).

The counsel for the General Counsel also correctly maintained that the work schedules prior to July 2016, were not produced pursuant to subpoena. The record reflects that the work schedules for Smith and Tineo and other unit employees prior to July 2016, were never received by the General Counsel. The counsel for the Respondent finally admitted at trial on June 20, 2017, that no work schedules exist prior to July 2016 (Tr. 603, 606).

when he first verbally warned Tineo. Perez said he received complaints from Smith and Almengo about Tineo's lateness and was told by them that it was "not fair to them because they always get more work whenever someone is late" (Tr. 582–588). Perez insisted that Tineo never called in when he failed to show up for work (Tr. 589–591).

With regard to Smith, Perez said he never gave Smith permission to work through his lunchbreaks. He stated that the rule was that an employee could not work through lunch (Tr. 616).

Perez was not involved in the disciplinary write-ups of Smith and Tineo. Perez testified he did not write up the warnings on the two employees. Perez said that he signed the warnings at the direction of David and then was instructed to issue the discipline to Tineo and Smith (GC Exhs. 12, 14). Perez testified that he is aware that three warnings under the store policy would result in a discharge. Perez also testified that he was not aware of any employees being discharged for the "three strikes and out" policy prior to July 2016 (Tr. 618, 643–645). Perez testified he was aware that the two written warnings of July 18 and 20 was due to Tineo's no show/no call to work (Tr. 590, 591).

Perez denied that he was at the June 24, 2016 meeting with the workers and management just prior to the election. He denied discussing the Union with any workers prior to the election and maintained that he was not even aware of the Union until after the representatives started to visit the facility after the election (Tr. 599–603, 616, 617). However, Perez was not credible on this point and admitted in his NLRB investigative affidavit that he was aware of the Union's organizing before the election (Tr. 626)

During the summertime around June 2016, some of the meat department employees told me they had signed cards to represented (sic) by a union. Employees, Sandra (Santa Nunez), Anthony and Joel and Nicholas and Cuma[11] (sic) were all in a group and wanted to talk to me about joining a union. I held a meeting with them that lasted out 15 minutes. I explained to the employees that the union was trying to convince them to pay the union and would try to get more money. I told them that was not the case. The union would have to look to the company to get them more money. I told them to think about the decision wisely. I told them a union is a good thing, but a lot of unions lie to employees and not always true what they seem. I told them ultimately their decision.

Perez also had a one-on-one conversation with Smith about the Union in June. He did not recall the exact date in June. Perez related to Smith that he did not care for being a union member after a different union he belonged had fraudulently taken money from its members. Perez told Smith that David (store manager) threatened to fire the meat department employees if they joined the Union. Perez stated "David did not want the Union and that anyone who did vote would get fired" (Tr. 630–633).

[11] Cuma was misspelled in the transcript. Cuma is actually Kemar Kenade Tello (GC Br. at 6).

2. The testimony of Jason Mei Phu Wang

Jason Mei Phu Wang a/k/a Ming F. Wang (Wang) testified that he was hired by David at the Jamaica facility towards the end of 2015 and was stocking goods, mopping and cleaning at that time. He denied being a supervisor or manager and denied replacing David as an acting manager when he left in September/October. Wang said that on occasions, he would help David in managing the store and admitted that he was David's assistant and continued being a store assistant after David left. As an assistant, Wang would serve as an interpreter conversing with the workers in English and translating in Chinese for David when dealing with assignments and discipline. Wang denied that he was responsible for assigning work schedules or granting leave, but has assigned tasks for the workers in the grocery department. Wang testified that he was also responsible for ensuring that the workers follow store policy in the cashier and meat departments (Tr. 647–651, 686–688).

On cross-examination, Wang admitted in his NLRB affidavit that he was and is the assistant manager, initially hired as stockman in mid-October 2015 and became supervisor in March 2016. The affidavit further stated that Wang became an assistant store manager in May or June and promoted to store manager after David left. As the store manager, Wang oversaw the employees in multiple departments and ensured that employees follow store rules and policy (Tr. 689–692).

With regard to Tineo, Wang stated that David would receive complaints from Santa (Nunez) from the meat department that Tineo was constantly late and Santa was the one who demanded that Wang hold Tineo to a written work schedule. Wang does not remember when the work schedule was prepared for Tineo. Wang said that Gou asked Tineo for his work preference and David approved Tineo's work schedule based upon his preference. Wang said that work schedules were also prepared for all the unit employees at the same time (Tr. 655–660; GC Exh. 8(b).

Wang testified that the Respondent has a store policy that three infractions would lead to a discharge if an employee fails to request leave within 48 hours or fails to call when not coming to work (Tr. 660–663). Wang testified that he was informed of the store policy when he was first hired and that David had asked him to translate this policy for the employees when they were hired and to explain the store policy to them. Wang admitted that he was not present when Tineo was hired so he did not know if the policy was explained to Tineo (Tr. 662–666).

Wang was aware of the warnings given to Tineo for violating the store policy regarding unscheduled leave and lateness. Wang said that he wrote the notice of warning when Tineo failed to show for work on July 4 (GC Exh. 15). Wang insisted that Tineo was given the warning on the day the infraction occurred. Wang also stated that he instructed Perez to discipline Tineo on the other two occasions (GC Exhs. 16, 17). Wang stated to Perez that "we can't tolerate that" (Tineo was coming in late to work) (Tr. 666–670).

Wang stated that Perez wrote the subsequent two disciplines on Tineo; that David signed the notices as a witness; and the actual management official who had issued the warnings was Guo (Tr. 670, 671; GC Exhs. 16 and 17: notice of warning

written by Perez). For both disciplines, Wang instructed Perez to write up Tineo (Tr. 672–675).

With regard to Smith, Wang testified that he wrote the discipline on Smith because David cannot write English (Tr. 674; GC Exhs. 9, 10, and 11). Wang stated that workers must take a lunchbreak and are not permitted to work through lunch. Wang's NLRB affidavit stated that he was told by Guo that Smith was not clocking out and in from his lunchbreaks. Wang stated that Smith told him and Perez that the meat department was busy and he did not have time to take a lunchbreak. Wang said that Smith was instructed to take a break and to not work through his lunchbreak (Tr. 696).

Wang stated that he prepared the termination notices on Tineo and Smith and gave the notices to Perez to sign and issued to the workers (Tr. 684, 685).

Wang was aware that the Union was certified at the Jamaica facility prior to July 2016, and that the Union was coming in the store. Wang testified he was not involved in any meetings with employees or management about the Union before July 2016. He stated that the first time he spoke to a union representative was after July 2016. Wang testified that the conversation with the union representative concerned the dismissal of Tineo and Smith. He was asked by Cugini whether the store would reinstate Smith and that the Union was not concerned over the discharge of Tineo because he was constantly arriving late to work (Tr. 651–655).

Wang denied that he was scrutinizing the meat department after the union election. He stated that he only went to the meat department with David to ensure the proper temperature setting for the meat and to translate. Wang said he went to the meat department two or three times a week. However, Wang also testified that he sometimes visit the meat department twice per day to monitor if the workers arrived to work on time as was reported by Perez to David (Tr. 680–682).

Wang denied meeting Jesse or knowing who she is and had only heard of that name mentioned by David. Wang denied speaking to Jesse (Tr. 683).

3. The testimony of Jia Ming Guo

Jia Ming Guo (Guo) testified that he works as a part-time payroll clerk at the Jamaica facility in July 2015. He works 20–30 hours a week and is responsible for receiving merchandise and paying for the goods received. He is also responsible for accounting for the workers' time and attendance for the purpose of payroll and is the custodian of the store records. Guo testified on behalf of the Respondent as the custodian of the business records and in his role regarding the discharge of Smith and Tineo (Tr. 727–730).

Guo testified that he was aware that Wang was promoted to assistant manager, but did not know when he was promoted. Guo believed that Wang was promoted 8 or 9 months ago (which would have been in September/October 2016). Guo insisted that Wang was a regular employee in June 2016. Guo believed that Wang is the acting manager at this time.

Guo testified that Wang would open the store and would be responsible for issuing discipline as an assistant manager. Guo confirmed that Wang was also responsible for verifying inventory received at the store. Guo said that Wang and Perez were paid on weekly basis. Guo testified that another assistant manager named James Lin was responsible for the grocery department (Tr. 740, 778–781, 784, 788, 789).

As the custodian of records, Guo testified that he is aware of disciplinary records from the start of Respondent's business until the present and that the written store policy has been acknowledged by all employees at the Jamaica facility. However, Guo admitted that there were no records that Tineo and Almengo had acknowledged the store policy when they were hired (Tr. 717, 718). Guo stated that he was responsible for informing new employees of the store policy on their first day of work, but noted that Tineo had not acknowledged the store policy when offered a job (Tr. 749–759; R. Exh. 4: job offer to Joe Tineo).

Guo stated that he is the custodian of the timecards and verified that the workers punch in and out when they arrive to work, punch out and in when they take breaks and punch out when they leave work.[12] Guo testified that it was his policy to inform all employees that clocking in and out was required (Tr. 737–738). As custodian, Guo said that he has written schedules of all store employees created since 2015 (Tr. 741, 742) and that the written schedules for the unit employees were prepared in July 2016, only because of complaints that workers were arriving late to work (Tr. 744–746).

Guo said he gave verbal warnings to the workers coming in late, but there are no records that the verbal warnings were documented prior to July 2016 (Tr. 744–746). Guo also admitted that Tineo had previously not clocked in and out and received no discipline for that infraction (Tr. 761–763; see, R. Exh. 5: Tineo's timecards). Guo also testified that he is also the custodian of records for any disciplinary actions issued to the workers. Guo stated that the discipline is usually issued by the supervisors on the same day when the infraction occurred and turned over to him for safekeeping. Guo testified that the Respondent maintains disciplinary records of all employees from September 2015 to January 28, 2017. However, Guo testified that there was only one discipline issued to a worker outside the meat department. He testified "I wasn't able to find others. This is the only one I found" (Tr. 746–748; R. Exh. 2).

With regard to disciplinary actions issued by the Respondent, Guo testified that he does not prepare the discipline and has no knowledge of discipline being issued (Tr. 764, 765). However, Guo subsequently testified that he was aware that Tineo was discharged because he could not adhere to his work schedule. Guo was aware that Tineo was always late and testified that Tineo was "countless time late" and would come to work at 9 a.m. when his start time according to his schedule was for 8 a.m. (Tr. 772–776, 792).

On cross-examination, Guo admitted that he signed the disciplinary action for Smith and Tineo (R. Exh. 2, GC Exhs. 9, 10, 11). Guo then inconsistently maintained that they were not his signatures and Wang had in fact signed the discipline (Tr. 781–784).

[12] Counsel for the General Counsel objected to the proffer of the timecards for all the workers at the Jamaica facility and maintained that the only relevant timecards are the meat department unit employees. I agreed (Tr. 733–736).

Guo also testified that Tineo was terminated twice, but did not recall when the first discharge occurred. Guo admitted that the July 20 discharge was the only date of record of Tineo's termination. Guo believed that Tineo's two discharges were 1 month apart. Guo could not explain why Tineo's payroll records show that he was working until August 15, 2016, (Tr. 793–796; R. Exh. 5). Guo did not know why or how Tineo came back to work after his alleged July 20 discharge. Guo stated there were no records of Tineo's second termination on August 15 (Tr. 810–815).

With regard to the Union organizing, Guo said he was aware of the election held on June 24 and was an observer for the Respondent. Guo stated that the election started at 2 p.m. and ended within 30 minutes. Guo said he has seen Jesse, who would come to the store to collect the cash receipts from the registers, but denied knowing who she is. Guo speculated that Jesse was a possible shareholder. Guo said he did not recall seeing Tineo before or during the election (Tr. 766–772).

d. The Union's Request for Information

Louis Sollicito (Sollicito) testified that he was and is the executive director for the Union since July 2012. He became aware of Green Apple in July 2016, when informed by President Kelly Egan that the Union won the election. At that point, Sollicito reached out to the attorney or owners to begin bargaining for a first contract (GC Exh. 7: emails between the Union and David Yan (Yan), representing the Respondent). Sollicito said that his first email was on July 14 to Yan and copied to Miguel Gonzalez, his assistant, to meet and negotiate a new contract (GC Exh. 7B).

The first bargaining session was on September 8 (Tr. 229–243). The Respondent's principal owners were present at the bargaining session. Also present was attorney Yan for the Respondent. Sollicito identified one of the owners as "George." Sollicito testified that the first contact with the Respondent was for bargaining and he was not aware at the time that Tineo and Smith had been discharged (Tr. 270–271).

There was a brief discussion about the two discharges and Sollicito was told by George that the discharges were justified and that the Respondent would not take them back. Sollicito said the Respondent never presented any documents that would support their discharges. Sollicito testified that George then said that the store did not make much money and that they were planning to sell the store. Sollicito specifically recalled that attorney Yan stated that the owners were actually considering selling the business (Tr. 244–246).

After this initial discussion, Sollicito request information from the Respondent for bargaining purposes. Sollicito mentioned the store policies and procedures and pay rates, but were interrupted and informed by Yan that Sollicito should send him an email on the information request. Sollicito asked for the information, but was stopped and told to send the request by email to Yan. Sollicito testified: "I said I was going to need information including pay rates; they instructed me to request it to the counsel (Yan)." The first session then ended (Tr. 244–247, 272, 276).

Sollicito followed with an email request for information and to reconsider reinstatement on the discharges of Tineo and Smith on September 8 (GC Exh. 7B at 2, 3). Sollicito's email requested the following information from the Respondent:

> a. A copy of the employer's healthcare plans and rates per coverage dependents
> b. A copy of the employer's handbook
> c. Any written policies and procedures
> d. Current paid vacation, personal and sick days employees receive
> e. Copies of employment applications currently being used
> f. Names and rates of pay employer is paying to employees in each store, by hour. This includes any who work on or off the books.
> g. Name of any interested buyers that are actively pursuing the Jamaica location

Sollicito testified that the information was needed for the Union to formulate proposals and to compare benefits with other unionized stores. Sollicito never received a reply to his email and made a second request for information on October 11 (GC Exh. 7 at 2). In response, Yan asked that Sollicito to call him. Sollicito attempted to call Yan, did not receive a response (Tr. 247–255).

On October 11, Sollicito received an email from Yan and requested that Sollicito call him because Yan did not receive the earlier phone call. Sollicito was busy at that time and asked Miguel Gonzalez to call Yan and to tell him he will call as soon as possible. Gonzalez was able to reach Yan and informed him that Sollicito will call back the following day. Sollicito tried to contact Yan the next day and left a message to call, but Yan never replied.

The parties did not communicate between October 11 and November 9. The next email occurred on November 9 from Sollicito to Yan and asked him to call. Yan replied to the November 9 email and asked for a number to reach Sollicito (Tr. 255–262).

Sollicito testified that he did not receive a call from Yan on November 10. Sollicito said that he has never received a complaint that he was unreachable at the phone number given to Yan, not even from Yan. He said that his phone number was provided to Yan at the first bargaining session and by email (Tr. 279–284). Sollicito insisted that Yan had his correct phone number because Yan had called him right after his October 11 email to him and Yan again called on October 12 with the same phone number. Sollicito could not understand why Yan then requested his phone number on November 9, but nevertheless Sollicito sent his number by email to Yan on November 10 (Tr. 285–290).

Sollicito complained that the Union never received the information requested and never received any written or oral clarifications for the request from the Respondent. Sollicito testified no information requested was received from the Respondent (Tr. 262–264). Sollicito testified that Respondent needed clarification but he was never informed by Yan as to the clarifications that were needed.

Miguel Gonzalez (Gonzalez) testified that he was and is the executive assistant to Sollicito and held this position for the past year. Gonzalez recalled speaking twice to Yan in mid-October. On the first occasion, Yan requested to speak to Sol-

licito and was informed that he was not available. Gonzalez took down Yan's phone number. Upon reaching Sollicito, Gonzalez was informed by Sollicito that he was in the midst of a bargaining session and that he will call Yan the following day. Gonzalez was instructed by Sollicito to contact Yan and inform him of the same.

Gonzalez contacted Yan and relayed the message from Sollicito. Gonzalez said that Yan did not object. Gonzalez followed up his two conversations with Yan by sending out an email to Sollicito on October 12 relaying the message that Yan wanted to speak to him. Gonzalez insisted that Yan never mentioned that the Respondent needed a clarification on the information request (Tr. 297–304; GC Exh. 7(b): email confirmation of the chain of events). Gonzalez testified that his role was to take down and relay the messages between Sollicito and Yan and was not involved in any discussions over the information request (Tr. 311).

DISCUSSION AND ANALYSIS

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, *Inc.,* 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above.

a. David, Wang, Perez, and Jesse are Agents of the Respondent and/or Supervisors Under the Act

The counsel for the General Counsel alleges that one of Respondent's owners is Jesse and, as such, she is an agent of the Respondent. It is also alleged that David, Wang, and Perez are agents and supervisors of Respondent and that Wendy Yeung is an agent of the Respondent (GC Br. at 7–13).

Throughout the hearing, the counsel for the Respondent attempted to obfuscate the names, identities and titles of the various officials responsible for the ownership and operations of the Respondent's Jamaica facility. The Respondent admitted that David was the store manager during the relevant period of time, but counsel for the Respondent denied knowing his last name. David did not testify. There is no dispute as to the title and authority vested in David. The Respondent refused to admit that Jason Wang was and is a 2(11) supervisor under the Act. The Respondent also denied that Yeung and Jesse are agents of the Respondent.

A "supervisor" is defined by Section 2(11) of the Act as someone who has the authority, in the interest of the employer, to perform and/or effectively recommend at least one supervisory action that indicates alignment with management interests. The list of supervisory tasks to be considered includes the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly direct them, or adjust their grievances, or effectively to recommend such action. Additionally, in order to be deemed a supervisor, the individual must exercise "independent judgment" that is "not of a merely routine or clerical nature" but requires the use of independent judgment when performing one or more of these tasks. *Kentucky River Community Care, Inc*., 532 U.S. 706, 712, 713 (2001).

A finding of supervisory status is warranted only where the individuals in question possess one or more of the indicia set forth in Section 2(11) of the Act, above. *Providence Hospital*, 320 NLRB 717, 725 (1996); *The Door*, 297 NLRB 601 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Providence Alaska Medical Center*, above, 320 NLRB at 725; *Juniper Industries*, 311 NLRB 109, 110 (1993). The statutory definition specifically indicates that it applies only to individuals who exercise independent judgment in the performance of supervisory functions and who act in the interest of the employer. *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 574 (1994); *Clark Machine Corp*., 308 NLRB 555 (1992).

The Respondent initially admitted that Jason Wang was and is the assistant manager of the Jamaica store. I find that the record clearly establishes that Wang was and is the assistant manager of the Jamaica facility and Wang sworn and signed his NLRB affidavit attesting that he was the assistant manager. At the hearing, Wang testified he was not an assistant manager and that he was responsible only for opening the store and assisting David with translation because David's English was limited. However, upon my own examination of the witness, Wang admitted that he was indeed the assistant to David and assigned work to employees, disciplined employees, opened and closed the store, count cash receipts and directed Perez to prepare the July written work schedules for the unit employees.

Perez denied that he was the manager of the meat department. He testified he was only responsible for cutting meat. However, Perez also testified that he discussed the work schedules with the unit employees and prepared their schedules based upon their preferences. Perez would also note when unit employees arrived to work and was involved in their discipline for store infractions. Perez also interviewed job applicants and tested their knowledge for the job before providing a recommendation.

Paragraph 11 of the subpoena issued by the counsel for the General Counsel sought "All documents, including but not limited to organizational charts, books, records, minutes of meetings job descriptions showing the managerial and supervisory hierarchy of Respondent." Paragraph 12 sought "Documents reflecting the job description, job title, duties, responsibilities, and authority of Store Manager David (last name unknown), Assistant Store Manager Jason Ming F. Wang, and Meat Department Manager Erick A. Peralta Perez."

In the General Counsel's motion for *Bannon Mills* sanctions,

counsel states that the Respondent was nonresponsive to paragraphs 11 and 12 of the subpoena (GC Exh. 20). The identities, titles and responsibilities of David, Wang, Perez, Yeung, and Jesse would have been established had the Respondent responded to paragraphs 11 and 12 of the subpoena.

Inasmuch as the Respondent's failed and refused to provide such documents, it would be appropriate under my *Bannon Mills* sanction order to draw a reasonable conclusion that Wang was the assistant store manager during all relevant times and that Perez held a position as the meat department supervisor. Even without this appropriate sanction, it is clear from the testimony of Wang and Perez that they hired, fired, scheduled work hours, reassigned, discipline, and independently instructed the work assignments of the unit employees.

I credit the testimony of Smith, Tineo and Almengo as secondary evidence that Wang and Perez held supervisory positions since the subpoenaed documents showing the Respondent's organization hierarchy were never provided by the Respondent. Their cumulative testimony showed that Wang and Perez had the authority to interview applicants for jobs in the unit department, direct work assignments and schedules to the employees, order products and sign invoices of goods received, transfer employees, approve time and attendance, suspend, discipline and discharge employees. Perez testified that he had the authority to discipline employees and had in fact issued two warnings to Tineo (Tr. 590). Wang also testified that he directed Perez to prepare the work schedules for the unit employees and approved or witnessed the issuance of the warnings to Smith and Tineo.

The counsel for the General Counsel also alleges that Perez, Wendy Yeung and Jesse were agents of the Respondent. The Respondent denied knowledge of their identities and positions within the company. The issue to be determined is whether Perez, Yeung and Jesse were agents for the Respondent within the meaning of Section 2(13) of the Act.

In *Cornell Forge Company,* 339 NLRB 733 (2003), the Board stated: The burden of proving an agency relationship is on the party asserting its existence. The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party. [Citations omitted]. In discussing apparent authority, the Board stated in *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 fn. 4 (1991): "Under this concept, an individual will be held responsible for actions of his agent when he knows or 'should know' that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him. Apparent authority is created through a manifestation by the principal to the third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the act in question." *Shen Automotive Dealership Group,* 321 NLRB 586, 593 (1996).

In determining the agency status of an individual not employed by the Respondent, the Board has long used common law agency principles. See. e.g., *Cooper Industries*, 328 NLRB 145 (1999); *Southern Bag Corp*., *Ltd.,* 315 NLRB 725 (1994). With regard to Perez, it appears clear that Perez, as a supervisor, did have actual authority to make, announce, or implement policy on behalf of Respondent, or that he had apparent authority to do so, depending on the circumstances. Perez testified that he translated the messages that he received from David and Jesse to the unit workers. Perez testified that he informed Smith before the union election that David told Perez that if the workers voted for the Union, David would close the store. Perez also relayed in Spanish a message he received from Jesse, who instructed him to tell the workers just 10 minutes prior to the June 24 election, that voting for the Union would result in the termination of the workers or the closing of the store. As such, Perez is clearly an agent for the Respondent and communicated to the unit employees the messages from David and Jesse. I credit the testimony of Smith, Tineo and Almengo when they testified that the threats to close the store if they supported and voted for the Union were conveyed to them by Perez who stated that the messages were from David and Jesse. Specifically, Smith testified that he had a conversation with Perez about June 8 and was given a message from David through Perez that anyone voting for the Union would be fired. In testimony provided by Perez, Perez corroborated their June 8 conversation by stating "David did not want the Union and that anyone who did vote would get fired" (Tr. 630–633). For these reasons, I find that Perez acted on behalf of David and Jesse and had the authority to convey these threats to the unit employees.

With regard to Wendy Yeung and Jesse, the test in determining agency under such circumstances is whether employees "would reasonably believe that the [alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426–427 (1987); *Einhorn Enterprises*, 279 NLRB 576 (1986). Yeung was identified as a principal and appeared with the Respondent's counsel at the hearing. According to the counsel for the General Counsel, Yeung was also identified as a principal at the representation petition and Cugini identified Yeung as the individual representing the Respondent at the preelection conference. Yeung, although present at the hearing, did not testify. Yeung was identified by Smith as the Respondent's representative at the election on June 24 who had objected to Smith's presence during the voting. According to Smith's testimony, which I credit as credible, Yeung insisted that Smith leave but was permitted to stay by the Board agent since he was designated as an observer for the Union during the election process. Jesse was identified as one of the owners and/or shareholders of the Respondent. Guo believed that Jesse was a shareholder. Wang testified that David never mentioned Jesse to him and he did not know who she is. The Respondent did not clarify her status or provide a title for this individual. Jesse did not testify. I find and credit the testimony of Tineo and Almengo as credible and consistent with regard to the message they received from Perez just prior to the election on June 24. Both Tineo and Almengo testified that Perez told them and the other workers at a meeting that Perez was translating in Spanish a message he received from Jesse. As such, the employees would reasonably believe that Jesse had actual or apparent authority to tell Perez that the Respondent will either fire the workers or close the store if the workers voted for the Union.

Accordingly, I find that David, Wang, and Perez are supervisors under 2(11) of the Act. I also find that Jesse, Yeung and Perez are agents of the Respondent under 2(13) of the Act.

b. The Respondent violated Section 8(a)(3) and (1) of the Act When it Disciplined and Discharged Anthony Smith and Joel Tineo

The counsel for the General Counsel argues that the Respondent disciplined and discharged Anthony Smith and Joel Tineo for their union support and concerted activity in violation of Section 8(a)(3) and (1).

Section 8(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer violates Section 8(a)(3) by disciplining employees for antiunion motives. *Equitable Resources*, 307 NLRB 730, 731 (1992). To establish a violation of Section 8(a)(3) and (1) in cases where a discipline and discharge is alleged, the General Counsel has the burden to prove that the disciplinary action or discharge was motivated by employer antiunion animus.

Section 8(a)(1) of the Act provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging and disciplining employees because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1). Section 7 of the Act guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." See, *Brighton Retail Inc.*, 354 NLRB 441, 447 (2009). In *Myers Industries (Myers 1),* 268 NLRB 493 (1984), and in *Myers Industries (Myers 11)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."

Concerted activity includes not only activity that is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014). If the employee or employees who are acting in concert are seeking to improve terms and conditions of employment, their actions are for mutual aid and protection of all employees within the meaning of Section 7. Id., slip op. at 3, 5–6.

In assessing Respondent's motive, this case is no different than any other 8(a)(3) and (1) case. The Board requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatees' protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB* v. *Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983); *American Gardens Management Co.,* 338 NLRB 644 (2002).

The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. Unlawful motivation is most often established by indirect or circumstantial evidence, such as suspicious timing and pretextual or shifting reasons given for the employer's actions. Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge or refusal to hire and other actions of the employer; disparate treatment of certain employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge and proximity in time between the employees' union activities and their discharge. *WF. Bolin* Co. *v. NLRB,* 70 F.3d 863, 871 (6th Cir. 1995).

Under *Wright Line*, above, the General Counsel must demonstrate by a preponderance of the evidence that the employees were engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee." *Director, Office of Workers' Comp. Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 278 (1994); *NLRB v. Sea-Land Service*, *Inc.*, 837 F.2d 1387 (5th Cir. 1988).

In the matter before me, I find that the General Counsel has made a prima facie showing that the union and concerted activity of Smith and Tineo was a motivating factor in the Respondent's decision to discipline and discharge them. *Wal-Mart Stores, Inc.,* 352 NLRB 815 fn. 5 (2008) (citing *Gelita USA, Inc.,* 352 NLRB 406, 407 fn. 2 (2008)); *SFO Good-Nite Inn, LLC,* 352 NLRB 268, 269 (2008); also see *Praxair Distribution, Inc.,* 357 NLRB 1048 fn. 2 (2011). Here, the General Counsel has shown the existence of activity protected by the Act. Second, the General Counsel has proven that the Respondent was aware that the employees engaged in such activity. The General Counsel has also shown that the alleged discriminatees suffered an adverse employment action because of the Respondent's animus.

Union and Concerted Activity Engaged by Smith and Tineo

It is not seriously disputed that Smith and Tineo engaged in activity in support of the Union's organizing campaign at the Jamaica facility and that both engaged in concerted activity with other unit workers regarding their discussions on the benefits of joining the Union. Smith credibly testified that he first approached the Union seeking employment after he was laid-off from this position with the Respondent. During this time, Smith engaged in conversation with various union officials regarding what he perceived to be low wages and lack of benefits working for the Respondent. Upon being rehired with the Respondent, Smith spoke to Cugini about organizing the meat department workers. Smith was the intermediary between Cugini and the workers in providing information about the benefits of the Union and in securing union authorization cards from the workers. Smith was also an observer when the union

election was held on June 24 and became a shop steward after the election. Tineo also credibly testified that he has spoken to Zabala about union organizing at the Jamaica facility. Zabala confirmed that she had discussed on several occasions with Tineo about the union campaign to organize. Both Smith and Tineo credibly testified that they had discussed with the meat department workers about the benefits of the Union and the need to have a union at the store.

Knowledge

During this time, the Respondent, through Perez, Guo, and Wang, had knowledge of the union campaign at the Jamaica facility and that Smith and Tineo supported the Union's efforts to organize the store. Wang initially testified he was not involved in any meetings with employees or management about the Union before July 2016. He stated that the first time he spoke to a union representative was after July 2016. However, Wang testified that he was aware of the Union's presence prior to the election that was held on June 24. Perez initially denied that he was at the June 24, 2016 meeting with the workers and management just prior to the election and denied discussing the Union with any workers prior to the election and maintained that he was not even aware of the Union until after the representatives started to visit the facility after the election. Upon being presented with his NLRB investigative affidavit, Perez admitted that he was aware of the Union's organizing before the election and spoke to several meat department workers about his own personal aversion to unions in June.

Accordingly, I reject as totally without merit the Respondent's argument that employer knowledge is not established when it thought but did not know for certain that union activity occurred. The Board and the courts have long held that when the General Counsel proves an employer suspects alleged discrimmatees of union activities, the knowledge requirement is satisfied. See, e. g., *Turnbull Cone Baking Co. of Tennessee v. NLRB*, 778 F.2d 292, 296 (6th Cir 1985).

Animus

Discriminatory motive may be established in several ways including through statements of animus directed to the employee or about the employee's protected activities, *Austal USA, LLC*, 356 NLRB 363, 363 (2010); the timing between discovery of the employee's protected activities and the discipline, *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a nondiscriminatory explanation that defies logic or is clearly baseless, *Lucky Cab Co.*, 360 NLRB 271 (2014); *ManorCare Health Services—Easton,* 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.,* 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088 fn.12, *citing Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

To rebut the presumption established by the General Counsel, the Respondent bears the burden of showing the same action would have taken place even in the absence of protected conduct. See *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996); *Farmer Brothers, Co.,* 303 NLRB 638, 649 (1991). To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *Durham School Services, L.P.*, 360 NLRB 694 (2014).

Turning to the Respondent's defense, the Respondent contends that Smith was discharged after the third and final warning for twice failing to clock out and in during his lunchbreaks and once for arriving late to work. The Respondent contends that Tineo was discharged after his third and final warning for failing to call his supervisor when he was not coming to work.

I find that the alleged nondiscriminatory reason for the discipline and discharge of Smith and Tineo as clearly baseless.

The Respondent argues that employees are discharged after three violations of the Respondent's store policy. The Respondent stated that Smith was discharged after receiving his third and final warning for twice failing to clock out and in during his lunchbreak and once for arriving late to work by 40 minutes (GC Exhs. 9, 10, and 11). The Respondent stated that Tineo was discharged after his third and final warning for failing to show up for work and did not call when he was absent from work (GC Exhs. 15, 16, and 17).

Wang testified that the store policy was that three infractions would lead to discharge if an employee fails to request leave within 48 hours or fails to call when not coming to work. (Tr. 660–663). Perez testified that he is aware of the "three strikes and you are out" store policy but was not aware of any employees being discharged for the three strikes and out policy prior to July 2016 (Tr. 619, 643–645).

Under my *Bannon Mills* sanction order, I agreed with the General Counsel that the Respondent failed to provide in paragraph 4(c) of the subpoena

> All investigatory files, written statements, internal records, notes or emails, as created and/or shared by and among Respondent's supervisors, including, but not limited to Meat Manager Erick A. Peralta Perez, Assistant Store Manager Jason Ming F. Wang, and Store Manager David (last name unknown) showing any investigation conducted by Respondent into any conduct by Smith and the reasons relied upon for issuing each of the disciplines described in paragraph 4(a).[13]

A similar request was made in reference to Tineo's discipline in paragraph 6(b) of the General Counsel subpoena. The Respondent did not provide any documents responsive to paragraphs 4(c) and 6(b) of the subpoena.

As such, the counsel for the General Counsel is at a disadvantage to verify or to rebut the "three strikes and out" policy because the Respondent never provided the internal records or notes or basis for the disciplines issued to Smith and Tineo. Further, any written statements as to the reasons for issuing the

[13] Par. 4(a) references the three disciplines that were issued to Smith on August 15.

disciplines were never provided to the General Counsel which would have allowed the General Counsel to effectively cross-examine the Respondent's witnesses as to the basis for the disciplines.

Despite not having the benefit of reviewing the subpoenaed statements regarding the "three strikes and out" policy and its application on the discharge of Smith and Tineo, a close review of the company policy does not support the "three strikes and out" policy as it applied to them.

In reviewing the store policy, there are several infractions that would result in a dismissal after three warnings. The wearing headphones and playing music is strictly prohibited inside the store and would result in a dismissal after three infractions. The texting with the phone at work may result in a dismissal after three infractions. An employee showing his/her undergarments while working may result in dismissal after three infractions or not wearing proper store uniform may result in dismissal after three infractions. The failure to request time off 48 hours in advance will result in a warning and may result in dismissal. There is no mention that three violations of this work rule will result in a dismissal. In addition, the store policy states that the failure to provide 1 hour minimal notice to supervisor for sick leave will result in a warning and may result in dismissal. There is no mention that three violations of this infraction will result in a dismissal. Finally, the store policy on punching in and out only states that "staff must punch in and out for lunch within 5 minutes of scheduled break. The Lunch Break will be arranged by management." Unlike the work rules noted above, there is no "three strikes and out" policy and no penalty attached to the work rule if an employee fails to punch out and in for scheduled breaks (GC Exh. 13A).

With regard to Smith, the Respondent did not provide credible evidence to document the incident that caused his discharge or that Smith had a work history of unsatisfactory performance. Smith was immediately discharged after receiving three warnings on the same day.[14] Two of the warnings related to the failure of Smith to clock out and in during his lunchbreak. I credit Smith's testimony that he was too busy with work and never took a lunchbreak, thereby, not needing to clock out or in during his breaks. The record does not reflect that there was a store policy against working through one's lunchbreak. Smith's third infraction was arriving late to work on August 8 by 40 minutes. Smith testified that oftentimes, the store does not open on time and that other employees have been late and not disciplined. The Respondent provided no rationale why the two incidents for failing to clock out and in and one for tardiness were so serious that would result in his immediate discharge. The Respondent provided no explanation as to whether Smith's reasons for the infraction were unworthy of belief. This is especially true when, although the rule requires an employee to punch in and out within 5 minutes of the scheduled break, there is no penalty attached to the failure to do so. Further, Smith had only one written warning for allegedly failing to arrive to work on time. The rule requiring an employee to timely arrive to work and failing to call in when late or absent from work would result only in a warning and not a discharge. Accordingly, I find that Smith was discharged in violation of Section 8(a)(3) and (1) of the Act.

With regard to Tineo, there is clearly no store policy that three tardiness violations would result in his discharge. While it is clear that Tineo admitted that he has been late to work, sometimes two or three times per week, the Respondent does not have a clear store policy that being late three times will result in a discharge. I credit Tineo's testimony when he testified that he would call Perez when he would be arriving late to work and Perez had no problems with his late arrival. Tineo testified that he was not counseled or issued any warnings about his lateness prior to July and that he would make up his time by working a longer day. I would credit Tineo's testimony on this point because the Respondent never proffered any documented verbal or written warnings prior to July although Perez testified that Tineo was constantly late. Tineo's notice of termination also never stated a reason for his discharge. Tineo surmised that he was fired because he refused perform nonunit work at the direction of David on the Friday prior to his termination.

The testimony provided by Guo was inconsistent and not worthy of credit. Guo testified that he is also the custodian of records for any disciplinary actions issued to the workers. The record shows that Tineo was issued three warnings for lateness/not reporting to work on July 4, 18, and 20. On the same day that Tineo received his final warning, Tineo was also given his discharge notice (GC Exh. 13, 14). Guo testified that Tineo was terminated twice, but did not recall when the first time he was fired. Guo believed that the two separations were 1 month apart (Tr. 793–796). The Respondent exhibit 5 shows Tineo was on the company payroll until August 15, 2016. Tineo credibly testified that he never received any warnings prior to his discharge on August 15. The record shows that none of the written warnings were signed by Tineo or that he had refused to sign the warnings. Tineo testified that he was discharged on Monday after he had refused direct instructions from David on the previous Friday to mop the floor in another department. Union Representatives Zabela and Cugini observed Tineo on the premises on August 15. On the other hand, Guo could not explain the circumstances surrounding Tineo's discharge on July 20 or explain his reinstatement to his former position and his subsequent second termination on August 15. The Respondent provided no witnesses or evidence to explain this inconsistency. As such, I can reasonably conclude that Tineo was not discharged twice but that his three warnings and the July 20 discharge notice was simply manufactured as a pretext to discharge Tineo for his union and concerted activity.

The Board has held that an employer's failure to conduct a fair and full investigation into the incident causing the employee's discharge and to give the employee the opportunity to explain his action before imposing discipline is a significant factor in finding discriminatory motivation. *Publishers Print-*

[14] On this point, I credit the testimony of Smith and Tineo when they stated their three warnings were given on the day of their discharge even though the notices of warnings were issued on prior dates. In rebuttal, none of the Respondent's witnesses could recall the circumstances surrounding the issuance of the earlier warnings, and as such, I could reasonably conclude that Smith and Tineo did not receive any prior warnings before receiving all three warnings and their notices of discharge on the same date.

ing Co., *Inc.,* 317 NLRB 933, 938 (1995), enfd. 106 F.3d 401 (6th Cir. 1996). The failure of the Respondent to conduct a meaningful investigation and to give the alleged discriminatees an opportunity to explain demonstrates discriminatory intent. *Andronaco*, 364 NLRB No. 142 (2016), slip op. at 14.

I find that the timing of the discharges, shortly after Smith and Tineo voiced their support for the Union and the Board's certification of the Union as the exclusive collective-bargaining representative of the meat department unit also supports an inference that the Respondent's disciplines and discharges were motivated by their support for the Union. *State Plaza Hotel*, 347 NLRB 755, 755–756 (2006); *Toll Mfg. Co*., 341 NLRB 832, 833 (2004); *Davey Roofing, Inc*., 341 NLRB 222, 223 (2004) (temporal proximity between union activity and employer's adverse action is evidence of unlawful motivation).

Smith actively engaged with the union representatives, helped distribute authorization cards to the meat department workers and encouraged the workers to support the Union. Tineo discussed supporting the Union with Smith and other workers on the work floor. In response to their union activities, Smith and Tineo were fired less than 2 months after the June 24 election. Tineo was discharged on August 15 when he was late and received his third warning. That was the same day that Tineo received two more warnings for allegedly being late on two prior occasions. Smith was discharged on August 15 after being given a third and final warning for not clocking out and in during his breaks. Smith also received two more warnings on the same day for allegedly failing to clock out and being late for 40 minutes on another occasion. The timing of the two discharges just weeks after the union election shows discriminatory antiunion animus. *Lucky Cab Co.*, 360 NLRB 271, 274 (2014).

The timing and the simultaneous issuance of three disciplinary warnings on the same day as their discharge represents significant evidence of unlawful motivation. *Trader Horn of New Jersey, Inc.,* 316 NLRB 194, 198 (1995). As stated by the administrative law judge in *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 slip op. at 31 (2016), "Indeed, "timing alone may be sufficient to establish that union animus was a motivating factor in a discharge decision." *Sawyer of NAPA,* 300 NLRB 131, 150 (1990); *NLRB v. Rain-Ware, Inc.,* 732 F.2d 1349, 1354 (7th Cir. 1084), *NLRB v. Windsor Industries, Inc.,* 730 F.2d 860, 864 (2d Cir. 1984); *Manor Care Health Services—Easton,* 356 NLRB 202, 204, 226 (2010) (Proximity in time between discriminatee's union activity and discharge supports finding of unlawful motivation for the termination); *LaGloria Oil & Gas Co.*, 337 NLRB 1120, 1123, 1132 (2002). (Discharge shortly after Employer learned of employee's union activities, strongly supports a finding that discharge motivated by union animus")."

Finally, antiunion animus was demonstrated by Perez's comments to Smith and the unit workers. As noted above, Perez had a one-on-one conversation with Smith about the Union about June 8. Perez related to Smith that he did not care for being a union member after a different union he belonged had fraudulently taken money from its members. Perez told Smith that David (store manager) threatened to fire the meat department employees if they join the union. Perez stated "David did not want the Union and that anyone who did vote would get fired" (Tr. 630–633). On this point, I credit Perez's testimony that David, the store manager, had threatened to discharge any workers who voted for the Union because the Respondent never rebutted this testimony and indeed, Perez's statement is an admission that clearly shows the Respondent's antiunion animus. Perez was also present on the morning of the election when he translated into Spanish a message from Jesse during a captive audience meeting with the unit employees that the Respondent will close the store if the workers voted for the Union.

The Respondent demonstrated antiunion animus in violation of Section 8(a)(3) and (1). I find that the disciplines and discharge of Smith and Tineo was motivated by their union support and activity for the Union, and that the Respondent had not met their burden of persuasion to demonstrate the same action would have taken place even in the absence of the protected conduct. *Wright Line*, above, at 1089.[15]

c. The Respondent Violated Section (a)(3) and (1) of the Act by Threatening Smith, Tineo and Unit Employees with More Strict Enforcement of Work Rules

An employer also violates Section 8(a)(3) and (1) of the Act when it more strictly enforces its work rules in response to employees' union activities. *Print Fulfillment Services LLC,* 361 NLRB No. 144, slip op. at 3–4 (2014). It is clear that the store attendance and other infraction policy were applied less severe to nonunit workers. A review of Respondent exhibit 2 shows that on some occasions, an employee would have more than three warnings, but for different infractions and was not discharged. On other occasions, an employee may have three warnings for the same infraction and was not discharged. The Respondent held Smith and Tineo to a stricter standard. Each received three warnings and were immediately discharged. The Respondent provided no explanation as for the stricter enforcement of its work rules with Smith and Tineo. Instead, the Respondent maintains that there was no change in the "three strikes and out" policy, arguing that any three warnings of any type of infractions will result in the employee's termination. That argument is contradicted by the objective record which shows that no employee was fired despite having numerous warnings prior to the union petition was filed.

Guo testified that the disciplinary records of all employees existed from September 2015 to January 28, 2017. Guo testified that there was only one discipline issued to a worker outside the meat department. He testified "I wasn't able to find others. This is the only one I found" (Tr. 746–748; R. Exh. 2). However, subsequent to the close of the hearing, Respondent exhibit 2 was supplemented and received on September 14, 2017 (almost 3 months after the hearing close on June 20) that contained the disciplinary records of numerous employees at the Jamaica facility.

This, of course, became highly prejudicial to the General

[15] The Respondent has not shown that it would have taken the same disciplinary actions against Smith and Tineo absent their union and concerted activities. As shown below, nonunit employees with equal or greater frequency of work rule violations were not discharged and only Smith and Tineo were the only employees discharged after they voiced support for the Union.

Counsel since cross-examination of Guo on his knowledge of the discipline given to other workers was not possible.[16] For example, Guo testified that Tineo was discharged because he was always late and testified that Tineo was "countless time late" and would come to work at 9 a.m. when his start time was 8 a.m. according to his schedule. However, Respondent exhibit 2, as proffered at the time of the hearing, showed only one other disciplinary action (employee Robert Walton), so the General Counsel was unable to verify the accurateness of Guo's statement that only Tineo was allegedly "countless time late" and fired or that there was only one discipline issued to a nonunit employee. But, a review of Respondent exhibit 2 supplemented after the close of the record, shows that the Respondent was less severe in its enforcement of work rules with nonunit workers. A review of Respondent exhibit 2 after it was supplemented by the Respondent reveals the following disparity and a more lenient enforcement of the work rules with nonunit employees:

> Employee Janel was given a first warning on March 29, 2016 despite the comment from the supervisor that "Every week she call and say she have something to do when the schedule is already make (sic). She call many times" (R. Exh 2. at 33). Unlike Tineo, Janel was late many times but received only one warning and was not terminated.
>
> Employee Marilyn was a "no show, no call" on three occasions, but only received a second warning (R. Exh. 2 at 53, 54 and 56).
>
> Employee Nadesha received a second warning despite the fact that she has been subordinate twice to a supervisor and has been "always late" and uses her headset and phone while at work (R. Exh. at 34). Nadesha was not discharged.
>
> Employee Shaida was issued three warnings but was not terminated (R. Exh. 2 at 47, 49 and 50).
>
> Employee Deyda was issued three warnings and was not terminated (R. Exh. 2 at 42, 43 and 44).
>
> Employees Haynes and Irene have violated store policy on at least three occasions and were not terminated (R. Exh. 2 at 3, 13, 30, 36, 45, 48 and 51).

The disparity in treatment in the discharge of Smith and Tineo is most glaring when the infractions that they were accused of committing would not have automatically resulted in their discharge because those work rules did not have a "three strikes and out" policy. The store policy states that all first shift employees must arrive at work by 8:05 a.m. There is no penalty attached to this rule. The store policy also states that staff must request time off within 48 hours in advance. The penalty for this infraction is a warning and may result in a dismissal. The rule requiring a worker to punch out and in for lunchbreaks does not state a penalty for this infraction (GC Exh. 13A).

The more lenient treatment of nonunit members further supports a finding that the change in enforcement of the Respondent's work rule policy, particularly with attendance, against employees in the unit was discriminatorily motivated. *Dynamics Corp. of America*, 286 NLRB at 921, 934.

Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) when it applied a more strict enforcement of work rules to Smith, Tineo and the unit employees.

d. The Respondent violated Section 8(a)(3) and (1) of the Act With Threats of Reprisal Against Employees for their Support for the Union

Paragraphs 13 and 14 in the amended complaint allege that threats were made by the Respondent to the meat department workers prior to the union election because of their support of the Union in violation of Section 8(a)(3) and (1) of the Act. These allegedly included threats of termination or stricter enforcement of work rules against employees for their support of the Union. Paragraph 8 of the amended complaint alleges that about June 24, 2016, Respondent, by the name of Jesse (last name presently unknown) at the Respondent's facility, during a captive audience meeting, made a threat of plant closure to employees in violation of Section 8(a) (1) of the Act (GC Exh. 20 at 11, 12).

Statements made by an employer to employees may convey general and specific views about unions or unionism or other protected activity as long as the communication does not contain a "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969). Statements are viewed objectively and in context from the standpoint of employees over whom the employer has a measure of economic power. See, e.g., *Mesker Door, Inc.,* 357 NLRB 591, 595 (2011). When an employer tells employees that they will jeopardize their jobs, wages, or other working conditions by supporting a union or engaging in concerted activities, such communication tends to restrain and coerce employees if they continue to support a union or engage in other concerted activities in violation of Section 8(a)(1). *Noah's Bay Area Bagels, LLC,* 331 NLRB 188 (2000); *Bloomfield Health Care Cent*er, 352 NLRB 252 (2008).

The Respondent's June 8 Threats

I credit Smith's testimony that he was informed by Perez about June 8 that David would close the store if the workers voted for the Union. According to Smith, Perez said that the owners were against the Union and told him that "if the Union does come in they will shut down the meat department and if they had to they would closed the entire building." Smith conveyed to Cugini what Perez had told him. Smith elaborated to Cugini that Perez told the workers that management had three options, (1) close the entire facility, (2) close the meat department or (3) to discharge everyone. This conversation was actually confirmed by Perez, who did not recall when the conversation occurred, but testified that "David did not want the Union and that anyone who did vote would get fired" (Tr. 630–633). Cugini also corroborated that Smith informed him about this

[16] The counsel for the General Counsel did not have the benefit of the information contained in Respondent exhibit 2 after it was supplemented which demonstrated that nonunit employees were actually treated more leniently for violations of store policy. As such, her posthearing brief did not argue that Smith and Tineo were actually treated (and not just threatened by Perez) with a more strict enforcement of work rules (GC Br. at 5, 6).

threat shortly after the June 8 petition hearing.

The Respondent's August 10 Threats

At the hearing, Smith, Tineo and Almengo corroborated that Perez had threatened unit employees with harsher treatment if they violated the store policies, particularly with regard to their attendance. As noted in my findings, following the Union's election, Smith told Perez about August 10 that the unit employees felt they had targets on their back because of their support for the Union. According to Smith, which testimony I now credit, Perez responded that the Respondent wanted Perez to write up and discipline unit employees for any infractions and that they better be "on their best behavior." Additionally, Smith, Tineo and Almengo consistently testified that David and Wang would frequent the meat department more often and scrutinized the unit employees' arrival time.

In addition, Tineo, like Smith, testified that the working conditions changed drastically after the election. He said that hardly anyone from management spoke to the workers, but when they did speak, they spoke to him and others in a "bad" way by screaming. Tineo said that he was threatened with termination by James and David if he didn't do what he was told. Almengo also complained about constant surveillance by David and was told to perform nonunit work. Almengo said that David did not speak and only used hand gestures and would point with his finger when he wanted him to go and mop the floor.

The Respondent's Captive Audience Meeting by Owner Jesse

I credit the testimony of Almengo, who recalled a meeting on June 24, just prior to the union election with Perez and other workers present and that Perez told them that the owners will close the company if they vote for the Union. Almengo said that Perez spoke in Spanish and that the message was given to Perez from an individual who was a female owner of the store. He was present prior to the voting and said that Perez told them that the owner was a lady, but Almengo did not know her name. Almengo said that the unit meeting took 10 minutes and the voting occurred 10 minutes after this meeting. Tineo testified that he was informed by Perez that the message came from the lady owner and believed her name to be Jesse. Tineo corroborated Almengo's testimony regarding the captive audience meeting with Jesse. I credit Tineo's testimony that the Respondent held a meeting on the day of the election and the unit workers were told by a female named Jesse that the Respondent will close the store if they voted for the union, as translated into Spanish by Perez.

The counsel for the Respondent objected to the testimony as hearsay. Although hearsay testimony is permissible, but limited in probative value, the Respondent never provided any witnesses to rebut the testimony of Tineo that was corroborated by Almengo on the captive- audience meeting held by Jesse. Indeed, and more significantly, Perez was called as a witness by the Respondent and his testimony substantiated that threats were made by the owners to close the store if the workers voted for the Union. Perez admitted in his NLRB investigative affidavit that he was aware of the Union's organizing before the election and told the workers that unions would lie to employees and they are not always true (as to) what they seem. Perez also told Smith on June 8 that he did not care for being a union member and told Smith that the store manager had threatened to fire the meat department employees if they join the union. Perez stated "David did not want the Union and that anyone who did vote would get fired" (Tr. 630–633).

In specifically assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire*, 308 NLRB 72 (1992). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp*., 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, above.

An employer violates Section 8(a)(3) and (1) of the Act by threatening employees with loss of employment and plant closure for supporting and voting for the union. Here, the Respondent violated Section 8(a)(3) and (1) when it communicated to employees that they will jeopardize their job security, wages or other working conditions if they support the Union. *Metro One Loss Prevention Services Group*, 356 NLRB 89 (2010) at 89–90 (employer statement that employees should be grateful for their years of service and pay rates and warning that it could get much worse if a union came in constituted unlawful threat). The mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Section 8(a)(1). See, e.g., *SDK Jonesville Division, LP*, 340 NLRB 101, 101–102 (2003) (unspecified threat that it was not in employee's best interest to be involved with the union found violative, citing *Keller Ford*, *Inc.,* 336 NLRB 722 (2001), enfd. 69 Fed. Appx. 672 (6th Cir. 2003) (a supervisor unlawfully advised an employee not to talk to other employees about insurance copayments, because it could be "hazardous to [his] health);" *Long Island College Hospital*, 327 NLRB 944, 945 (1999) (a supervisor unlawfully told employees to proceed with caution in taking a work related issue to the union, because one of the employees was getting an unfavorable reputation with management). Also, *Aqua-Aston Hospitality, LLC*, 365 NLRB No. 53 (2017)(where the vice-president of operations told employees that they would lose work, that they were lucky to have jobs, where employees would reasonably understand comments to mean that the employer was angry with their union activities and would feel threatened).

Further, I find that the Respondent engaged in objectionable conduct when it held a captive-audience meeting with the unit employees at the facility during a critical period before the representation election in violation of Section (8)(a)(1) of the Act. *Keystone Automotive Industries, Inc*., 365 NLRB No. 60 (2017).

In applying the totality of the circumstances test, and considering the context, I find the threats and statements made to the unit employees about their union sympathies and threatening to fire unit employees or apply more strict enforcement of work rules violated Section 8(a)(3) and (1) of the Act. See *Association of Community Organizations For Reform Now (ACORN)*, 338 NLRB 886 (2003). Accordingly, I find and conclude that Respondent violated Section 8(a)(3) and (1) of the Act when it threatened unit employees on or about June 8, June 24, and

August 10 with loss of employment and stricter enforcement of work rules for supporting the Union.

e. The Respondent Violated Section 8(a)(5) and (1) of the Act When it Refused and Failed to Provide the Relevant Information Requested

The Union requested information on September 8 and when the Respondent was not responsive to the request, a second request for the same information was made on October 11.

The General Counsel contends that the Respondent unlawfully failed and refused to provide the Union with information that was relevant and necessary to the Union in connection with bargaining with the Respondent. It is without doubt that the Union's information request for a copy of the employer's healthcare plan, employer's handbook, policies and procedures; rates of pay and types of benefits of the unit employees is highly relevant for the purpose of bargaining for a first contract.

It is well settled that an employer is obligated to furnish information requested by its employees' collective-bargaining agent that is relevant and necessary to the Union's bargaining responsibilities and contract negotiations. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *Iron Workers Local 207*, 319 NLRB 87, 90 (1995). The Respondent has a statutory obligation to provide the Union with requested information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435–436 (1967); *Centura Health St. Mary-Corwin Medical Ctr.*, 360 NLRB 689, 689 (2014).

The burden is on the employer, once relevance is established, to provide an adequate explanation or valid defense to its failure to provide the information in a timely manner. *Woodland Clinic*, supra, *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993).

There is no dispute that the Respondent simply ignored the Union's information request. The Respondent maintains that the information was vague and requested clarification on the request. However, the Respondent never articulated which items were considered unclear. The Respondent, through its labor representative, had ample opportunities, either by emails or voice message to state what was the lack of clarity in the Union's request. Instead, the Respondent delayed in providing an explanation or clarification by playing phone tag with Sollicito. The Respondent never stated what was unclear with the information request and could have simply asked for a clarification by email or a voice message. I would also note that the Respondent never raised an objection to the information requested, such as based upon privileged or confidentiality of the information.

The Respondent did not provide a defense as to its failure and refusal to provide the Union's request for information on its health plan, handbook, store policies, employee benefits, and a list of names and rates of pay for employees in each store. As to information regarding the unit employees, there is a presumption that the information is relevant to the Union's bargaining obligation. The information request on any health and benefits package plan is obviously relevant and necessary for contract negotiations and, therefore, a mandatory subject of bargaining. *Hen House Market No. 3*, 175 NLRB 596 (1969). It is a violation of 8(a)(5) and (1) of the Act when an employer fails or refuses to provide information requested for contract negotiations. *NLRB v. Truitt Mfg., Co.,* 351 U.S. 149 (1956).

The Respondent violated Section 8(5) and (1) of the Act when it failed to provide the Union with relevant information that is necessary to properly perform its duties as the exclusive bargaining representative. *Truitt Mfg., Co.*, above. The information was necessary and relevant for the Union to negotiate a first contract with the Respondent. Relevancy should be broadly construed and absent any countervailing interest, any requested information that has a bearing on the bargaining process must be disclosed. The burden to show relevancy is not exceptionally heavy, "requiring only that a showing be made of a probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). The standard for relevancy to apply is a liberal discovery-type standard requiring only that the information be directly related to the union's function as a bargaining representative and that it appear "reasonably necessary" for the performance of that function. *Acme Industrial Co.,* supra.

The Union also requested information on the names and rates of pay employer is paying to employees outside of the bargaining unit, including employees working off the books and on a part-time basis in addition to the name of any interested buyers that are actively pursuing the Jamaica location. It is well settled that the foregoing type of information regarding the wages, terms and conditions of unit employees is presumptively relevant to the Union's bargaining obligations and must be furnished upon request. *Fused Solutions, LLC*, 359 NLRB No. 118 (2013); *Metro Health Foundation, Inc.*, 338 NLRB 802 (2003); *Southern California Gas Co.*, 342 NLRB 613, 614 (2004).

A request for information outside of the bargaining unit, such as information about vacation days, health insurance, sick days, rates of pay, is not considered presumptively relevant and thus the relevance required to be established is somewhat more precise. *Ohio Power Co.*, 216 NLRB 987, 991 (1975); *Caldwell Manufacturing Co.*, 346 NLRB 1159 (2006*); Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994). In *Sheraton Hartford Hotel,* 289 NLRB 463 (1988), the Board stated:

> Section 8(a)(5) obligates an employer to provide a union requested information if there is a probability that the information would be relevant to the Union in fulfilling its statutory duties as bargaining representative. Where the requested information concerns wage rates, job descriptions, and other information pertaining to employees within the bargaining unit the information is presumptively relevant. Where the information does not concern matters pertaining to the bargaining unit, the Union must show that the information is relevant. When the requested information does not pertain to matters relating to the bargaining unit, to satisfy the burden of showing relevance, the union must offer more than mere suspicion for it to be entitled to the information.

The burden to show relevancy is not exceptionally heavy, but it does require ". . . a showing of probability that the desired information is relevant and…would be of use to the union in

carrying out its statutory duties and responsibilities." *Saginaw Control & Engineering, Inc.,* 339 NLRB 541, 544, 545 (2003). Cugini testified that the Union's need for information on the names of employees, employee benefits, rates of pay, and health insurance plans of the nonbargaining unit employees is necessary to compare wage rates and benefits between the nonbargaining and bargaining unit employees in order to determine the reasonableness of any contract proposal offered by the Respondent in the bargaining negotiations. I find such information relevant for the Union to ensure that any negotiated contract with the Respondent would compare favorably with the pay rates of the nonbargaining employees.

I also find that the information request for the name of any potential buyers of the Jamaica facility is also relevant inasmuch as the Respondent's owners had complained to Sollicito that the Jamaica facility is a small operation and they could not afford to increase benefits and wages to the unit employees and might sell the store. The information request on potential purchasers of the Jamaica facility would enable the Union to determine and verify the accuracy of the owners' assertions that they were willing to sell the store because there were no funds to pay any increase wages and benefits to the bargaining unit employees. I credit Sollicito's testimony on this point inasmuch as none of the Respondent's owners testified as to their version as to what had occurred on the first day of bargaining.

I find that the Union has met its burden to show that the information requested of bargaining and nonbargaining unit employees was relevant and necessary for it to perform its statutory duties in carrying out the collective-bargaining agreement in monitoring the terms of the contract and to process the pending grievance.

Further, although not argued by the General Counsel, the failure to timely provide the information requested is a separate 8(a)(5) violation of the Act. An employer must timely respond to a union's request seeking relevant information even when the employer believes it has grounds for not providing the information. *Regency Service Carts*, *Inc.,* 345 NLRB 671, 673 (2005) ("When a union makes a request for relevant information, the employer has a duty to supply the information in a timely fashion or to adequately explain why the information will not be furnished"); *Kroger Co.*, 226 NLRB 512, 513–514 (1976). As such, the Respondent was obligated to provide the information that needed no clarification in a timely manner and to engage in discussions over the items that may have been unclear to the Respondent. Absent evidence justifying an employer's delay in furnishing such information, such a delay is violative of the Act.

I find that the Union was entitled to the information in its request and at the time it made its initial request, and it is the employer's duty to furnish it as promptly as possible. *Monmouth Care Center*, 354 NLRB 11, 41 (2009); *Woodland Clinic*, 331 NLRB 735, 737 (2000). Here, the Union never received any information. As such, an unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) as a refusal to furnish the information at all. *Monmouth Care*, supra; *Woodland Clinic*, supra; *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989).

Accordingly, I find that the Respondent failed to timely provide and refused to provide the Union's request for information that was necessary for the Union to perform its duties as the exclusive collective-bargaining representative of the unit employees in violation of Section 8(a)(5) and (1) of the Act.

f. The Respondent Violated Section 8(a)(5) and (1) of the Act When it Unilaterally Implemented New Work Schedule Policy

Paragraph 18 of the amended complaint alleges that "about July 4, 2016, Respondent implemented a new work schedule policy applicable to Unit employees" in violation of Section 8(a)(5) and (1) of the Act (GC Exhs. 1 and 20).[17] The counsel for the General Counsel argues that the new work schedule policy relates to wages, hours and other terms and conditions of employment and is therefore, a mandatory subject for collective-bargaining.

It is not in dispute that the unit employees were required to acknowledge and sign a new work schedule about July 4. Wang and Guo testified that written schedules were prepared after they had received complaints from a unit employee (Santa Nunez) that others were arriving late to work, particularly Tineo. Perez testified that he ascertained the work schedule preferences from each unit employee before finalizing their schedule. Perez had hoped that the employees will now adhere to the work schedule of their own choosing.

An employer violates Section 8(a)(5) and (1) of the Act if it change the wages, hours, or terms and conditions of employment of represented employees without providing the Union with prior notice and an opportunity to bargain over such changes. See, *NLRB v. Katz*, 369 U.S. 736, 743–747 (1962). Under Board law, the Respondent was under a legal obligation to provide notice to the Union and an opportunity to bargain over any planned changes in the terms and conditions of employment of the unit employees. The implementation of unilateral changes by the Respondent of a mandatory subject for bargaining affects the terms and conditions of employment of the unit employees in violation of Section 8(a)(5) and (1) of the Act. *Proven St. Joseph*, supra; *Champion Parts Rebuilders*, *Inc.,* 260 NLRB 731, 733–734 (1982). An unlawful unilateral change "frustrates the objectives of Section 8(a)(5)," because such a change "'minimizes the influence of organized bargaining' and emphasizes to the employees 'that there is no necessity for a collective bargaining agent.'" *Pleasantview Nursing Home v. NLRB*, 351 F.3d 747, 755 (6th Cir. 2003) (quoting *Katz*, supra at 744, and *Loral Defense Systems-Akron v. NLRB,* 200 F.3d 436, 449 (6th Cir. 1999)); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993).

Wang testified that Perez prepared the work schedules based upon the employee's preference. Wang said that Perez approved the schedule and the signature of the employee was witnessed by David, the store manager (GC Exh. 8). Labor attorney Yan conceded that there were no written work schedules for any workers at the Jamaica store prior to July 2016, including for the unit employees (Tr. 603–606). It is not disputed that the Union was never informed of the planned changes or of the implementation of the new work schedules about

[17] The written work schedules were actually signed by the unit employees on July 7 and 8 (GC Exh. 8).

July 4. The work schedules of all store employees were requested pursuant to subpoena by the counsel for the General Counsel. The work schedules were never produced and not received by the General Counsel. The only work schedules available were from the unit employees prepared and issued in July 2016. The only work schedules created by Guo in July 2016 were for the unit employees. Guo testified that "During the period I didn't create any other schedules except these." Based upon Guo's prior testimony that he created work schedules for all employees in 2015, an adverse inference was taken under my *Bannon Mills* sanction order because the work schedules of all employees available at the beginning of 2015 pursuant to subpoena should have been turned over to the General Counsel, but were not (Tr. 741–744).[18]

It is now axiomatic that employers must bargain with the collective-bargaining representative of its employees regarding significant, material changes of their wages, hours or working conditions before changing the status quo. *Katz,* above. The foregoing work schedule changes affected employee terms and conditions of employment and were, thus, a mandatory subject of bargaining. See *Mid-Continent Concrete*, 336 NLRB 258 (2001), enfd. 308 F.3d 859 (8th Cir. 2002) (health insurance); *Desert Toyota*, 346 NLRB 132 (2005), citing *Abernathy Excavating, Inc.*, 313 NLRB 68 (1993) (regularly scheduled pay dates); *Migali Industries*, 285 NLRB 820, 825–826 (1987) (vacation scheduling); *E. I. du Pont & Co.*, 346 NLRB 553, 579 (2006) (severance pay).

Accordingly, I find that the Respondent violated Section 8(5) and (1) of the Act when unilateral changes were made to the work schedules without first providing notice and an opportunity to bargain with the Union over the changes in the terms and conditions of employment of the unit employees.

g. The Respondent did not Violate Section 8(1) of the Act by Maintaining and Promulgating an Overly Broad Texting and Confidentiality Rule

The amended complaint alleges in paragraph 12 that on about May 15, 2016, the Respondent maintained in effect the following work-related rules

> a. All documents are considered confidential and the sole property of Green Apple Supermarket and are not to be distributed or taken off the premises. There is to be no copying, faxing or photographing of documents. Failure to comply may result in dismissal and legal action.
>
> b. Texting and playing electronic games is strictly prohibited and will result in a warning: 3 warnings will result in a dismissal.

The General Counsel alleges that the maintenance of the above work-related rules violated Section 8(a)(1) of the Act because the rules interfered with, restrain, or otherwise coerce employees in the exercise of their rights under Section 7. A rule or policy violates Section 8(a)(1) if it can reasonably be read by employees to chill their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C.Cir. 1999); *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). The Board's analytical framework for determining whether the maintenance of a work rule violates Section 8(a)(1) of the Act was set forth in *Lutheran Heritage Village-Livonia*

> In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The counsel for the General Counsel does not argue that the work rules explicitly restrict activities protected by Section 7 or that the rules were promulgated in response to Section 7 activity. The General Counsel argues that employees would reasonably construe the language in the rules to prohibit Section 7 activity (GC Br. at 68). However, no testimony was taken from any witness for the General Counsel or evidence proffered as to how and in what manner these rules affected the employees from exercising their Section 7 rights. The above rules were promulgated and maintained before the Union became the exclusive bargaining-representative of the unit employees. The record is also void of any evidence that the rules has been applied in this situation to coerce or interfered/restrained with employees' rights under Section 7.

I find that the rules are not facially offensive under the Act. As such, I recommend dismissal of this allegation in the amended complaint.

CONCLUSIONS OF LAW

1. The Respondent Green Apple Supermarket of Jamaica, Inc.is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Jason F. Wang, Erick Peralta Perez and David, last name unknown, are supervisors within the meaning of Section 2(11) of the Act and agents within Section 2(13) of the Act. Wendy Yeung and Jesse are agents within Section 2(13) of the Act.

3. The Union, Local 342, United Food & Commercial

[18] Guo's testimony that work schedules existed prior to July 2016 is in direct contradiction to the assertion of the counsel for the Respondent that no such documents existed prior to July 2016 (see, fn. 5 and Tr. 603, 606). As such, the sworn testimony of a witness carries more weight and credibility than the unsworn assertion by counsel. An adverse inference is highly appropriate in this instance in that if the work schedules were in fact produced by the Respondent to the General Counsel, the documents would have shown that the Respondent made a unilateral change in the terms and conditions of the unit employees' employment without noticing the Union and bargain over the changes. On the other hand, if the work schedules for nonunit employees actually did not exist as contended by Respondent's counsel, then the unit employees were clearly treated in a disparate manner solely on the basis of their union membership when only they were required to adhere to a written schedule prepared shortly after they joined the Union.

Workers (Union) is labor organization within the meaning of Section 2(5) of the Act.

4. The Union is, and at all material times, has been the exclusive collective-bargaining representative for the following appropriate unit:

> All regular full-time and part-time employees employed in the meat and deli departments, excluding all store supervisors, grocery workers, managers, guards, and supervisors as defined by the Act.

5. The Respondent discriminatorily disciplined and discharged Anthony Smith for his union and concerted activities in violation of Section 8(3) and (1) of the Act and interfered with, restrained, and coerced Anthony Smith in the exercise of his rights guaranteed in Section 7 of the Act.

6. The Respondent discriminatorily disciplined and discharged Joel Tineo for his union and concerted activities in violation of Section 8(3) and (1) of the Act and interfered with, restrained, and coerced Joel Tineo in the exercise of his rights guaranteed in Section 7 of the Act.

7. The Respondent threatened unit employees with termination, plant closure and stricter enforcement of work rules for their support for the Union and enforced more strict work rules on the unit employees in violation of Section 8(3) and (1) of the Act.

8. The Respondent failed to notify and bargain with the Union regarding the unilateral implementation of written work schedules for the unit employees in violation of Section (5) and (1) of the Act.

9. The Respondent refused and failed to timely provide the information requested by the Union that is necessary and relevant to perform its duties as the exclusive collective-bargaining representative of the unit employees.

10. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

11. The Respondent did not otherwise violate the Act in the amended complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent having discriminatorily issued discipline and terminations to Anthony Smith and Joel Tineo, I shall order the Respondent to offer Smith and Tineo full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other employee emoluments, rights or privileges previously enjoyed, and to make them whole for any loss of earnings suffered as a result of the Respondent's unlawful actions against them. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), my recommended order requires Respondent to compensate Smith and Tineo for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file with the Regional Director for Region 29 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ for New Jersey*, 363 NLRB No. 143 (2016).

In addition to the remedies ordered, I shall recommend that the Respondent compensate Smith and Tineo for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. *King Soopers, Inc*., 364 NLRB No. 93 (2016). Search for work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[19]

It is recommended that Respondent expunge all references to the disciplines dated August 8, 9, and 10, 2016 including the "Employee Warning Notices" and discharge, including the notice of discharge dated August 15, 2016, issued to Anthony Smith from his files, and notify him in writing that it has done so and that the disciplines and discharge will not be used against him in any way.

It is recommended that Respondent expunge all references to the disciplines dated July 4, 18 and 20, 2016, including said "Employee Warning Notices" and the discharge, including said

[19] The counsel for the General Counsel's brief argues that Smith and Tineo be awarded consequential damages beyond the parameters of *King Soopers, Inc*., above, and makes a strong argument that reimbursement is appropriate under the Act for work related expenses and economic loses flowing from the unlawful discharge (GC Br. at 76–81). I would note that all remedial relief flows from the simple premise that a victim of discrimination should be as nearly as possible be placed in the position he or she would have been in but for the prohibited discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Compensatory damages consist of a wide variety of relief including pecuniary and nonpecuniary damages. Pecuniary damages are intended compensation for out-of-pocket expenses incurred as a result of the employer's unlawful action and may include job-hunting, stationary and postage, telephone expenses, resume services, fees referral, costs of transportation interviewing for jobs and other job search fees, losses in mortgage payments, foreclosure of residence, storage of personal belongings, actual cost of medical care, including physical and psychiatric therapy.[19] The 1991 Civil Rights Act made available compensatory damages in employment discrimination cases and such damages are intended to compensate a victim of discrimination for losses or suffering caused by the discriminatory act. *Carey v. Piphus*, 435 U.S. 247, 254 (1978). Compensation for similar out-of-pocket work related expenses for victims of unfair labor practices under the Act would not be unreasonable, and I would note that the backpay remedy under Title VII of the Civil Rights Act of 1964 was in fact modeled on the backpay provisions of the NLRB Act and its backpay remedy is a "make whole" remedy. *Albemarle* at 419, above. Nevertheless, such a change must come from the Board. In *Katch Kan*, 362 NLRB No. 162 (2015) at fn. 2, the Board stated ". . . because the relief sought (out-of-pocket work related expenses) would involve a change in Board law, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *Ishikawa Gasket America, Inc*., 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and cases cited therein."

notice of discharge dated July 20, 2016, issued to Joel Tineo from his files, and notify him in writing that it has done so and that the disciplines and discharge will not be used against him in any way.

It is further recommended that Respondent immediately rescind the unilateral implementation of the written work schedules for the unit employees and, upon request, bargain with the Union on the work schedules of the unit employees.

It is further recommended that the Respondent immediately, upon request of the Union, provide the relevant information in its request to the Respondent about September 8, 2016.

The counsel for the General Counsel also requests that I order a responsible management official read the notice to the assembled unit employees or to have a Board agent read the notice in the presence of a responsible management official (GC Br. at 73). I note that the Board has held that in determining whether additional remedies are necessary to fully dissipate the coercive effect of unlawful discharges and other unfair labor practices, it has broad discretion to fashion a remedy to fit the circumstances of each case. *Casino San Pablo*, 361 NLRB No. 148, slip op. at 6–7 (2014); *Excel Case Ready,* 334 NLRB 4, 4–5, (2001). In the instant case, I find that the unfair labor practices of Respondent Green Apple to justify the additional remedy of a notice reading. The Respondent engaged in violations of Section 8(a)(5) and (1) of the Act. In addition, the Respondent discharged Smith and Tineo, supporters of the Union, in violation of Section 8(a)(3) and (1) of the Act. The Board has held that the unlawful discharges of union supporters are highly coercive. *Excel Case Ready*, supra at 5.

I find that a public reading of the remedial notice is appropriate here. The Respondent's violations of the Act are sufficiently serious and widespread such that a reading of the notice is necessary to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices. Accordingly, I will require the attached notice to the read publicly by the Respondent's representative or by a Board agent in the presence of the Respondent's representative in the English and Spanish languages.

ORDER

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[20]

The Respondent, Green Apple Supermarket of Jamaica, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining, threatening, more strictly enforcing work rules or otherwise discriminating against employees because they engaged in protected union and concerted activities.

(b) Failing and refusing to timely provide Local 342, United Food & Commercial Workers, AFL–CIO with relevant information in its role as the exclusive collective-bargaining representative of the unit employees.

(c) Failing to bargain with Local 342, United Food & Commercial Workers, AFL–CIO regarding changes to the written work schedules provided to the bargaining unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Anthony Smith and Joel Tineo whole for any loss of earnings and other benefits, including reimbursement for all search-for-work and interim-work expenses, regardless of whether they received interim earnings in excess of these expenses, suffered as a result of the unlawful warnings and discharge, as set forth in the remedy section of this decision.

(b) Compensate Anthony Smith and Joel Tineo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 29 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(c) Immediately offer full reinstatement to Anthony Smith and Joel Tineo and if the offers are accepted, reinstate them to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Anthony Smith and Joel Tineo, including their warnings and thereafter notify them in writing that this has been done and that the discipline will not be used against them anyway.

(e) Provide to the Union, upon request, the information request made upon the Respondent on or about September 8, 2016.

(f) Bargain with the Union, upon request, regarding changes to the written work schedules provided to the bargaining unit employees.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay. Absent exceptions as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its existing property at the Jamaica facility, Queens, New York, a copy of the attached notice marked "Appendix"[21] in English

[20] If no exceptions are filed as provided by Sec. 102.46 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 24, 2016.

(j) Mail a copy of said notice to Anthony Smith and Joel Tineo at their last known addresses.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 29, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 19, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline, discharge or threaten to discipline or discharge or otherwise discriminate against you because you engage in protected union and concerted activities or to discourage you from engaging in these or other concerted.

WE WILL NOT threaten your loss of employment or benefits in order to discourage you from supporting the United Food and Commercial Workers, Local Union 342, AFL–CIO or any other union.

WE WILL NOT threaten or implement stricter work rules in order to discourage you from supporting the United Food and Commercial Workers, Local Union 342, AFL–CIO or any other union.

WE WILL NOT refuse to bargain collectively with the Union (United Food and Commercial Workers, Local Union 342, AFL–CIO) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the employees in the following unit:

> All regular full-time and part-time employees employed in the meat and deli departments, excluding all store supervisors, grocery workers, managers, guards, and supervisors as defined by the Act.

WE WILL NOT fail to bargain collectively with the Union by unilaterally implementing changes in terms and conditions of employment of our employees employed in the above described unit, in the absence of an overall lawful bargaining impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Anthony Smith and Joel Tineo full reinstatement to their former jobs or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Smith and Joel Tineo whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, including any pay increases made to similarly situated employees from the date of their respective discharge dates to the present, and including reimbursement for all search-for-work and interim-work expenses, regardless of whether they received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

WE WILL compensate Anthony Smith and Joel Tineo for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful notice of warnings and discharge of Anthony Smith and Joel Tineo.

WE WILL, within 3 days thereafter, notify Anthony Smith and Joel Tineo in writing that this has been done and that their discharge and warnings will not be used against them in any way.

WE WILL immediately rescind the written work schedules for the unit employees and, upon request from the Union, bargain over the unilateral changes made to the work schedules of the unit employees.

WE WILL, upon request of the Union, provide the information in its request made on or about September 8, 2016.

GREEN APPLE OF JAMAICA, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-183238 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX 1

ORDER GRANTING GENERAL COUNSEL'S MOTION TO AMEND THE COMPLAINT AND FOR SANCTIONS

On May 1, 2017, the counsel for the General Counsel moved before the Administrative Law Judge to amend the above referenced complaint to include the allegation that Respondent's owner or principal threatened employees with closure of Respondent's supermarket if they decide to support Local 342, United Food & Commercial Workers (Union) on the eve of the representation election on or about June 24, 2016. The counsel for the General Counsel verbally moved to amend the complaint and counsel for the Respondent provided an oral opposition to the motion to amend at the resumption of the hearing on May 2.

Also, at the resumption of trial on May 2, the counsel for the General Counsel moved for sanctions against the Respondent for failure of the Respondent to fully comply with a subpoena duces tecum issued by the Region on February 16, 2017 for documents to be produced at the start of the hearing on March 21. I granted the Respondent's request to submit his opposition in writing to the General Counsel's motions by close of business on May 8. I also instructed the General Counsel to provide a response, if any, to the opposition by close of business on May 10. The counsel for the Respondent failed to submit his opposition by May 8 and thereafter request an extension of time to May 12, which was granted. The counsel for the Respondent made a second request for an extension of time to May 15. The counsel for the General Counsel's response to the opposition was due by May 10, but in light of the extension of time granted to the Respondent, I also granted an extension of time for the General Counsel's response to May 22.

1. Order Granting General Counsel's Motion to Amend the Complaint

Testimony was elicited during the General Counsel's case-in-chief that workers at the Respondent's supermarket at issue were threatened with plant closure if they continued to support the organizing efforts of the Union. It is alleged that the threats were made by an individual named "Jesse" (surname unknown) who had been identified by witnesses as one of owners or principals of the store. Based upon the testimony taken at trial, the General Counsel moved to amend the complaint to include the allegation, *to wit*:

> New paragraph 8: About June 24, 2016, Respondent, by Jesse (last name presently unknown) at the Respondent's facility, during a captive audience meeting, made a threat of plant closure to employees.
>
> By the conduct described above in paragraphs 8 and 12 through 14, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

Respondent opposed the motion to amend and contends that it did not timely receive notice of the motion, there was no excuse in the delay to amend and counsel for the Respondent would not have sufficient time to prepare to litigate this new issue.

I find the Respondent's reasons for opposing the motion to amend the complaint without merit. Although I questioned the counsel for the General Counsel as to why this allegation could not have been uncovered during the investigation of the charges in this complaint, I was satisfied that sufficient notice was provided to the Respondent during the testimony of key witnesses that the threat was allegedly made on June 24. I find that this allegation is part and parcel and related to the allegations in paragraphs 12 and 13 in the consolidated complaint.[1] All three paragraphs allege similar threats made by Respondent's owners or supervisors against workers for their support of the Union.

Consequently, I find that the allegations are closely related and arise from the same factual situation involving the union organizing campaign to allow for the amendment. Further, since the Respondent has not presented its case-in-chief and the trial is not scheduled to resume until June 20, counsel for the Respondent has ample time to prepare a defense and to rebut this single allegation. *Amglo Kemlite Laboratories*, 360 NLRB 319 (2014) (judge erred in denying the General Counsel's motion to amend where Respondent did not object to the testimony at the time it was adduced and had the opportunity to examine both the witnesses and official who allegedly made the remake, and the motion amended an existing allegation, which alleged a similar threat in the complaint).

2. Order Granting General Counsel's Motion for Sanctions

On February 16, 2017, counsel for the General Counsel issued one subpoena (B-1-VGLDOL) to the Respondent. The Respondent never complied with the subpoena and at the first day of the hearing on March 21, counsel for the Respondent contends that the Respondent was never properly served with the subpoena. The counsel for the General Counsel provided evidence which I found to support proper service of the subpoena and therefore ruled that the Respondent failed to timely file a petition under Section 102.3(b) of the Board's rules to revoke the subpoena on relevancy and other grounds. The Respondent was ordered to produce the subpoenaed documents, but has consistently failed to fully provide the documents sought by the subpoena. The Respondent was ordered to produce all existing documents on March 21 and again on March 23 and Respondent's production date was extended to April 11. The Respondent was not in full compliance with the subpoena by the April 11 date and continued to submit documents to the

[1] Par. 12 alleges that "About June 8, 2016, Respondent, by Perez, at its Jamaica facility, threatened to terminate employees if they voted for the Union" and paragraph 13 alleges that "About August 10, 2016, Respondent, by Perez, at its Jamaica facility, threatened employees with more strict enforcement of work rules because employees joined and supported the Union."

General Counsel through April 27.

My review of the subpoena finds that it is not onerous. The allegations in the complaint involve a small bargaining unit consisting of five or less workers. The Respondent's facility in question is a small operation. The consolidated complaint alleges, among other allegations, that employees were disciplined and discharged for their support of the Union. While I fully appreciate the time and effort to gather the documents, I find that the Respondent has not even begun a good-faith effort to gather the documents. For example, one of the items in the subpoena request the disciplinary records of the discharged employees and other employees, time and attendance and payroll records, and any work/time and attendance policy. Respondent represented that such documents were either not available or did not exist. However, contrary to the Respondent's representations, the disciplinary records of one of the discharged employees were proffered during the cross-examination of a General Counsel's witness by Respondent's counsel on March 21. The counsel for the General Counsel correctly pointed out that the documents were not produced pursuant to subpoena, but now was being proffered during cross-examination (Tr. 68–71). In addition, the Respondent's signed store policy and the time and attendance cards of relevant employees were not submitted to the General Counsel pursuant to subpoena until April 27 towards the end of the General Counsel's case-in-chief.

I find that the counsel for the General Counsel was at an extreme disadvantage when he could not review and examine witnesses on documents that were subsequently proffered on cross-examination. The counsel for the General Counsel objected to the introduction of the disciplinary records and raised potential *Bannon Mills* sanctions on March 21.[2]

The Respondent has a good-faith obligation to gather responsive documents upon service of the subpoena. *McAllister Towing & Transportation*, 341 NLRB 394 (2004). Even assuming that the Respondent was not on notice that a subpoena was served, the Respondent was on notice as of March 21 to begin gathering documents pursuant to the subpoena. I find that the Respondent has not acted in good-faith to collect the subpoenaed documents and counsel has not (to this date) fully complied with the subpoena.

I have given the Respondent ample opportunities to fully comply with the subpoena and I have tolerated the excuses for noncompliance. I instructed the General Counsel to file a motion for sanctions when I was informed by the General Counsel on May 2 that the Respondent was still not in compliance with the subpoena. The motion for General Counsel seeks *Bannon Mills* sanctions and an adverse inference.

I find that sanctions are appropriate for all the reasons set forth in the General Counsel's motion. The Board has affirmed the authority of the administrative law judge to impose evidentiary sanctions against a noncomplying party and several sanctions are available where a party refuses or fails to timely or properly comply with a subpoena. The appropriate sanction is within the discretion of the judge. *McAllister Towing*, above.

Inasmuch as the General Counsel was unable to secure and review the subpoenaed documents relating to the personnel records, including the disciplinary records of the discharged employees and other employees, time and attendance policy, discipline policy, payroll and time and attendance records (including the clock-in-out punch cards), employee handbook, and any investigatory files (to include internal records, emails, notes, written statements that were generated and/or shared with Respondent's supervisors and principals relating to any investigation conducted by the Respondent on the discharged employees) prior to his case-in- chief and to compare their alleged misconduct work history with other employees who may have engaged in comparable conduct, I find that an appropriate sanction is to draw an adverse inference that the Respondent failed to show that it treated the discriminatees the same as other employees who may have engaged in similar misconduct. *Auto Workers v. NLRB*, 459 F.2d 1329, 1338–1344 (D.C. Cir. 1972).

As such, the Respondent is barred from presenting testimony from witnesses and evidence relating to show it treated the discriminatees in a comparable manner to other employees and I will fully accept the secondary evidence under *Bannon Mills*, including the hearsay testimony of General Counsel's witnesses relating to the number of employees in the unit (in lieu of the employee payroll and other records that the Respondent failed to produce) and accepting secondary evidence, including hearsay to the identity of the owners, supervisors, principals and agents who were present during and participated in the alleged incidents in the complaint, in lieu of the subpoenaed records for the organizational charts, books, records, minutes of meetings, job descriptions, job titles, duties, responsibilities, and authority of various individuals that would show the managerial and supervisory hierarchy of Respondent (paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 in the subpoena). *Bannon Mills* above.

Further, to be clear, I find as appropriate that the Respondent is barred from proffering the documents in the aforementioned subpoena paragraphs in examining witnesses and as evidence. *Perdue Farms*, *Inc.,* 323 NLRB 345 (1997) (Barring a noncomplying party from presenting evidence about the subject matter sought by the subpoena).

Finally, I find no merit in the Respondent's motion to dismiss the complaint. At the minimal, despite not having the subpoenaed documents for review and for litigation, the General Counsel has met his initial burden to establish a prima facie case in the complaint allegations.

New York, New York
June 6, 2017

[2] 146 NLRB 611 (2014).